DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-460
Title: Los Angeles County Flood Control District, Petitioner
v.
Natural Resources Defense Council, Inc., et al.
Docketed: October 13, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-56017)
Decision Date: July 13, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 11 2011	Petition for a writ of certiorari filed. (Response due November 14, 2011)
Nov 3 2011	Order extending time to file response to petition to and including December 14, 2011.
Nov 11 2011	Brief amici curiae of League of California Cities, et al. filed.
Nov 14 2011	Brief amicus curiae of California Stormwater Quality Association filed.
Nov 14 2011	Brief amicus curiae of National Association of Flood and Stormwater Management Agencies filed.
Nov 14 2011	Brief amicus curiae of Florida Stormwater Association filed.
Dec 14 2011	Brief of respondents Natural Resources Defense Council, Inc., et al. in opposition filed.
Dec 27 2011	Reply of petitioner Los Angeles County Flood Control District filed. (Distributed)
Dec 28 2011	DISTRIBUTED for Conference of January 13, 2012.
Jan 17 2012	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 23 2012	Brief amicus curiae of United States filed.
Jun 1 2012	Supplemental brief of respondents Natural Resources Defense Council, Inc., et al. filed.
Jun 4 2012	Supplemental brief of petitioner Los Angeles County Flood Control District filed.
Jun 5 2012	DISTRIBUTED for Conference of June 21, 2012.
Jun 25 2012	Petition GRANTED limited to Question 2 presented by the petition.
Jul 11 2012	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 16, 2012.
Jul 11 2012	The time to file respondents' brief on the merits is extended to and including October 15, 2012.
Aug 10 2012	The time to file respondents' brief on the merits is further extended to and including October 29, 2012.
Aug 10 2012	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including September 6, 2012.

Aug 24 2012 Brief amici curiae of National Governors Association, et al. filed.

Sep 5 2012 Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.

Sep 6 2012 Joint appendix (2 volumes) filed. (Statement of costs filed)

Sep 6 2012 Brief of petitioner Los Angeles County Flood Control District filed.

Sep 11 2012 Brief amici curiae of City of New York, et al. filed.

Sep 12 2012 Brief amici curiae of Nationwide Public Projects Coalition, et al. filed.

Sep 13 2012 Brief amicus curiae of United States in support of neither party filed.

Sep 13 2012 Brief amicus curiae of National Association of Home Builders filed.

Sep 13 2012 Consent to the filing of timely amicus curiae briefs, in support of either party or neither party, received from counsel for the petitioner.

Sep 13 2012 Brief amici curiae of League of California Cities, et al. filed.

Sep 13 2012 Brief amici curiae of National Hydropower Association, et al. filed.

Sep 13 2012 Brief amicus curiae of Western Coalition of Arid States filed.

Sep 13 2012 Brief amici curiae of Western Urban Water Coalition, et al. filed.

Sep 13 2012 Brief amicus curiae of Albuquerque Metropolitan Arroyo Flood Control Authority filed.

Sep 13 2012 Brief amici curiae of National Association of Flood and Stormwater Management Agencies, et al. filed.

Sep 13 2012 Brief amicus curiae of International Municipal Lawyers Association filed.

Sep 14 2012 SET FOR ARGUMENT ON Tuesday, December 4, 2012.

Sep 28 2012 Record received from U.S.C.A. for 9th Circuit. (1 envelope)

Sep 28 2012 Record from U.S.D.C. for Central District of California is electronic.

Oct 17 2012 CIRCULATED.

Oct 29 2012 Brief of respondents Natural Resources Defense Council, Inc., et al. filed. (Distributed)

Nov 2 2012 Brief amici curiae of National Wildlife Federation, et al. filed. (Distributed)

Nov 2 2012 Brief amicus curiae of Friends of the Everglades filed. (Distributed)

Nov 2 2012 Brief amicus curiae of Dr. Linwood Pendleton filed. (Distributed)

Nov 5 2012 Brief amici curiae of Professors on the "Addition of a Pollutant" Question filed. (Distributed)

Nov 5 2012 Brief amicus curiae of Heal the Bay filed. (Distributed)

Nov 5 2012 Brief amicus curiae of Professor Derek B. Booth filed. (Distributed)

Nov 5 2012 Brief amicus curiae of Douglas Emmett, Inc. filed. (Distributed)

Nov 5 2012 Brief amici curiae of Law Professors on deference to permit terms filed. (Distributed)

Nov 5 2012 Brief amici curiae of Friends of the Los Angeles River, et al. filed. (Distributed)

Nov 5 2012 Brief amici curiae of Alexandria Boehm, Ph.D., et al. filed. (Distributed)

Nov 5 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Nov 20 2012 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Nov 21 2012 Reply of petitioner Los Angeles County Flood Control District filed. (Distributed)

Nov 28 2012 Letter from counsel for respondents' citing additional authority filed and distributed.

Dec 4 2012 Argued. For petitioner: Timothy T. Coates, Los Angeles, Cal. For United States, as amicus curiae: Pratik A. Shah, Assistant to the Solicitor General, Department of Justice.

	Washington, D. C. For respondents: Aaron Colangelo, Washington, D. C.
Jan 8 2013	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., concurred in the judgment.

PETITION FOR WRIT OF CERTIORARI

No. 11-460

OCT 11 2011

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants stemming from municipal stormwater systems. 33 U.S.C. §1342(p).

The questions presented by this petition are:

1. Do "navigable waters of the United States" include only "naturally occurring" bodies of water so that construction of engineered channels or other man-made improvements to a river as part of municipal flood and storm control renders the improved portion no longer a "navigable water" under the Clean Water Act?

2. When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Natural Resources Defense Council, Inc., and Santa Monica Baykeeper, plaintiffs, appellants below, and respondents here.
- Los Angeles County Flood Control District, defendant, appellee below, and petitioner here.

In addition, the County of Los Angeles was a defendant in the underlying action and an appellee in the proceedings below, but is not a party to the petition in this Court.

There are no publicly held corporations involved in this proceeding.

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OPINIONS BELOW

The July 13, 2011 order and opinion of the United States Court of Appeals for the Ninth Circuit that is the subject of this petition is reported at ___ F.3d ___, 2011 WL 2712963 (9th Cir. 2011) and reproduced in the Appendix hereto ("App.") at pages 1-50. The Ninth Circuit's initial opinion was published at 636 F.3d 1235 (9th Cir. 2011) and is reproduced in the Appendix at pages 51-97.

The district court's two orders granting petitioner's motion for summary judgment with respect to the claims involved in this petition are not published and are reproduced in the Appendix at pages 98-102 and 103-32, respectively.

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit initially filed an opinion in this case on March 10, 2011. (App.51.) Petitioner timely filed a petition for rehearing. On July 13, 2011, the Ninth Circuit issued an order withdrawing its prior opinion and replacing it with an opinion filed that date, and denying the petition for panel rehearing and rehearing *en banc*. (App.1-2.)

28 U.S.C. section 1254(1) confers jurisdiction on this Court to review on writ of certiorari the July 13, 2011 opinion and judgment of the Ninth Circuit.

STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents to enforce permit requirements pursuant to provisions of the Clean Water Act (33 U.S.C. §1342(p)), which provides in pertinent part:

> (p) Municipal and industrial stormwater discharges
>
> (1) General rule
>
> Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.
>
> (2) Exceptions
>
> Paragraph (1) shall not apply with respect to the following stormwater discharges:
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and

> such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

The issues raised in this petition and addressed by the Ninth Circuit concern provisions of 40 C.F.R. section 122.26 in pertinent part:

> (a) Permit requirement.
>
> * * *
>
> (3) Large and medium municipal separate storm sewer systems. (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems. . . .
>
> (b) Definitions.
>
> * * *
>
> (8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management

agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

STATEMENT OF THE CASE

A. The Clean Water Act's Regulation Of Municipal Stormwater.

In 1972, Congress adopted amendments to the Federal Water Pollution Control Act (33 U.S.C. §1251, *et seq.*). After subsequent amendments in 1977, the statutes became known as the Clean Water Act ("CWA" or "the Act"). The purpose of the CWA is to "restore and maintain the chemical, physical, and

biological integrity of the Nation's waters." 33 U.S.C. §1251.

In the CWA, Congress established the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342), as one of the means to achieve the CWA's goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992).

33 U.S.C. section 1342(a)(1) provides that the Administrator of the Environmental Protection Agency ("EPA") may issue an NPDES permit "for the discharge of any pollutant." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. §1362(12). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. §1342(b)-(c). California has been delegated this authority. *See* Cal. Water Code §13370. In California, NPDES permits are issued by the State Water Resources Control Board or a Regional Water Quality Control Board. *Id.* at §13377.

In 1987 Congress enacted the Water Quality Act amendments, which established a new statutory scheme for the regulation of stormwater runoff. 33 U.S.C. §1342(p). The amendments set forth dates by which certain categories of stormwater dischargers

were required to obtain permits (*see Natural Resources Defense Council v. EPA*, 1966 F.2d 1292, 1296 (9th Cir. 1992)), and also enacted special provisions addressing municipal stormwater permits.

The 1987 amendments provided that permits for discharges from municipal storm sewers:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for control of such pollutants.

33 U.S.C. §1342(p)(3).

These provisions of the Act are focused on municipal separate storm sewer systems – "MS4s," which are systems handling only stormwater and not sewage.[1] Recognizing that it may be impracticable, or

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[1] The Ninth Circuit refers to general municipal separate storm sewer systems as "ms4s," and the municipal separate storm sewer system maintained by petitioner as the "MS4." (*See* App.8 n.2.) For sake of clarity, petitioner will instead follow common practice, and use the term "MS4" as a simple abbreviation

(Continued on following page)

undesirable to issue individual permits for MS4s operated by multiple municipalities within a large geographic area, EPA promulgated regulations allowing issuance of a permit covering multiple MS4s. *See* 40 C.F.R. §122.26(a)(3)(i)-(vi).

B. The Permit That Is The Subject Of The Underlying Litigation.

In December 2001, the California Regional Water Quality Control Board, Los Angeles Region, issued an NPDES Permit to 84 cities, the County of Los Angeles and petitioner Los Angeles County Flood Control District ("District"). (Excerpt of Record, "ER" 180-86.) The purpose of the Permit was to regulate stormwater and urban runoff discharges from each of the 86 MS4s operated by the permittees. (*Id.*)

The Permit specifically recognized that "[c]ertain pollutants present in stormwater and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over." (ER 182, Permit ¶B.2.) The Permit noted that "Federal, State, Regional or local entities within the Permittees' boundaries or in jurisdictions outside the Los Angeles County Flood Control District, and not currently named in this Order, may operate storm drain facilities and/or discharge storm water to storm drains and water courses covered by this Order." (ER 187, Permit

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for municipal separate storm sewer system and will indicate when it is referring to its own MS4.

¶D.2.) It further recognized the variability of stormwater discharges, finding that "[t]he quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events." (ER 182, Permit ¶B.1.)

Although the Permit was issued to 86 separate entities, under its terms, each permittee was responsible only for its own discharge: "Each Permittee is responsible only for a discharge for which it is the operator." (ER 199, Permit ¶G.4.) This is consistent with federal regulations: "*Co-permittee* means a permittee to an NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. §122.26(b)(1); *see also* ER 204, Permit, Part 3 D.1 (providing that the petitioner District, designated as principal permittee, "is not responsible for ensuring compliance of any individual Permittee").

The Permit also included a monitoring and reporting program. (ER 258-79.) The primary objectives of the monitoring and reporting program were: assessing compliance with the Permit; measuring and improving the effectiveness of the stormwater quality management plans; assessing the chemical, physical and biological impacts of receiving waters resulting from urban runoff; undertaking the characterization of stormwater discharges; identifying sources of pollutants; and assessing the overall health and evaluating long-term trends in receiving water quality. (ER 263.) These objectives would be accomplished through

various activities, including the monitoring of "mass-emissions" at seven mass-emissions monitoring stations. (ER 263.)

C. The Lawsuit.

On March 3, 2008, respondents Natural Resources Defense Council and Santa Monica Baykeeper filed a complaint against the County of Los Angeles, individual members of its Board of Supervisors in their official capacity, the head of the Los Angeles County Department of Public Works, and petitioner District under 33 U.S.C. section 1365(a). Respondents subsequently filed a first amended complaint asserting six claims for relief, with the first four claims alleging that discharges from the County's and petitioner District's MS4s caused or contributed to exceedances of water quality standards at the mass-emissions monitoring stations in the Santa Clara River, Los Angeles River, San Gabriel River, and Malibu Creek watersheds in violation of Part 2.1 of the Permit. (ER 453-58; *see also* 414, 426, 430-45.) The district court referred to these allegations as the "watershed claims."

D. The District Court's Decision.

Respondents moved for partial summary judgment against petitioner District with respect to exceedances of water quality standards in the Los

Angeles and San Gabriel Rivers. (App.104; ER 9.)[2] Defendants, including petitioner, also moved for summary judgment as to all watershed claims. (App.105; ER 9.)

Respondents contended that exceedances measured at the mass-emissions monitoring stations in and of themselves established a violation of the Permit that could be fairly attributable to the petitioner District's MS4. (App.117-18.) Defendants, including petitioner, contended in turn, that the mass-emissions monitoring station data could not be used to determine compliance with the Permit (a contention rejected by the district court) and there was no evidence of a "discharge" from defendants' MS4 that violated the Permit. (App.116.)

The district court initially denied both motions for summary judgment, concluding that an issue of fact existed as to whether pollutants in discharges from the District's MS4 exceeded the water quality standards set by the Permit. (App.105, 121-22.)

At the same time, the district court rejected respondents' contention that because the monitoring stations were within channelized portions of the rivers operated by District as part of its flood control system, the District was responsible for any exceedances measured there. This was because in order

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[2] The parties moved for summary judgment with respect to other claims that are not relevant to this petition.

for there to be a discharge for which the petitioner District could be liable, it was necessary that water be discharged from a "point source," and this Court had expressly held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that simply moving water between two portions of the same water body did not constitute a "discharge" from a point source under the Clean Water Act. (App.119.) The district court emphasized that there was no evidence that the Los Angeles River and San Gabriel River below the mass-emissions monitoring stations were bodies of water distinct from the MS4 above the monitoring stations, and found there was no evidence to "show where the MS4 ends and either River begins." (App.119.)

As the district court observed:

> In order for the District's actions to violate Part 2.1 of the Permit, it must be discharging pollutants from a point source. The Court has been presented with no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations.

(App.119.)

The district court ordered the parties to file supplementary pleadings indicating whether there were any facts showing that the standards-exceeding pollutants identified at the mass-emissions monitoring stations had at any time passed through defendants' "outflows" at or near the time the exceedances

were observed in the monitoring station data. (App.122.)

On April 26, 2010, following receipt of supplementary briefing, the district court granted summary judgment to petitioner on all watershed claims. (App.98.) The court found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 outflows at or near the time the exceedances were observed. (App.100.) Nor did respondents provide any evidence that the mass-emissions monitoring stations themselves are located at or near one of petitioner's outfalls. (*Id.*) The court again emphasized, that under the Permit, the District was only a co-permittee and that it could not be held liable for exceedances that may have been caused by discharges from outflows maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App.101-02.)

E. The Ninth Circuit's Decision.

Following briefing by the parties and oral argument, on March 10, 2011, the Ninth Circuit issued its published opinion reversing the district court in part, and directing the court to enter summary judgment for respondents as against petitioner with respect to the watershed claims regarding the Los Angeles and San Gabriel Rivers. (App.51-52, 93-94, 96-97.) Writing for the court, Judge Smith agreed with the district court that, contrary to respondents' contention, the mere presence of polluted stormwater at the

mass-emissions monitoring stations did not *ipso facto* establish petitioner's liability. (App.88-89.) However, the Ninth Circuit held that the district court had erred in concluding that there had not been a "discharge" under the CWA from the petitioner's MS4 into the Los Angeles or San Gabriel Rivers. The court found that the monitoring stations were in concrete channels maintained by petitioner as part of its MS4 and hence, when water exited these channels and flowed back into the "naturally occurring" portions of the "rivers," this constituted a "discharge" from an "outfall" for purposes of imposing liability on the District for violation of the Permit. (App.91-92.) The court explained:

> [T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted storm-water at the time it was measured or who caused or contributed to the exceedances when that water was again discharged into the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state

> *man-made* construction – not a *naturally occurring* Watershed River.

(App.91-92 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

(App.92.)

The District timely filed a petition for panel rehearing and rehearing *en banc*. Petitioner noted that the Ninth Circuit's opinion adopted a theory of liability that had not been briefed by the parties, namely that the District's channelization of portions of the Los Angeles and San Gabriel Rivers where the mass-emissions monitoring stations were located, somehow transformed these portions of the rivers from being navigable waters into non-navigable discrete portions of the District's MS4 so as to allow a "discharge" from an "outfall." As the District explained, this was flatly contrary to uniform statutory and case law holding that artificial channelization of navigable waters does not alter their character

for purposes of the CWA. Indeed, as the District observed, Justice Kennedy, in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 769 (2006), had noted that the Los Angeles River "has been encased in concrete and steel over a length of some 50 miles."

Moreover, the District noted that the court's *sua sponte* resolution of the heretofore unbriefed and uncontested issue concerning navigability was directly contrary to the EPA's specific finding in a report readily available on its website that the *entire* Los Angeles River, from its mouth to its headwaters, including the channelized portions noted in the Ninth Circuit opinion, was a "traditional navigable water" of the United States.[3]

Further, the District pointed out that by holding that channelizing portions of the navigable rivers somehow transformed their character so as to create a discharge from an outfall within the meaning of the Clean Water Act, the court had effectively overruled this Court's decision in *Miccosukee Tribe*, since the court was finding a permit violation based on transfer of water within a single navigable body of water.

The Ninth Circuit requested respondents to respond to the petition for rehearing, and respondents did so.

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[3] http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf accessed March 30 and October 7, 2011. The District requested judicial notice of the EPA report.

On July 13, 2011, the Ninth Circuit issued its order withdrawing its prior opinion, and issuing a new opinion. (App.1-2.) The only major modification of the prior opinion was to address an argument raised by the parties in their briefing that was not addressed in the prior opinion concerning the appropriate remedy in the event violations were found. (App.37-38.) However, the court repeated, verbatim, its reasoning from the prior opinion that the District was liable for a "discharge" from an "outfall" based on the fact that the monitoring stations were within portions of the river that the District, as part of its MS4, had improved with concrete channels. (*See* App.44-45, and *compare to* App.91-92.) The court did not address any of the points raised in the petition for rehearing concerning long-standing law that a water body's status as a navigable water for purposes of the CWA was not affected by its man-made nature. It declined to address, let alone reconcile its holding with the EPA's own determination that the Los Angeles River, including the channelized portions, constituted navigable waters, and summarily denied the request for judicial notice.

Nor did it address this Court's holding in *Miccosukee Tribe* that there could not be a "discharge" within the Clean Water Act based upon merely transferring water from one portion of a single body of water into another.

REASONS WHY CERTIORARI IS WARRANTED

The Clean Water Act regulates discharge of pollutants into the navigable waters of the United States from stormwater runoff. It does so by imposing a permit scheme for medium and large municipalities to discharge stormwater into navigable waters. 33 U.S.C. §1342(p).

Here, respondents Natural Resources Defense Council and Santa Monica Baykeeper sued petitioner Los Angeles County Flood Control District, asserting that it had violated its stormwater permit by improperly discharging stormwater that exceeded water quality standards into the Los Angeles and San Gabriel Rivers. Respondents made no effort to establish that any of the District's outfalls along the banks of either river discharged stormwater containing levels of pollutants exceeding those allowed by the Permit. Instead, respondents argued that they need not show a discharge – it was enough that the monitoring stations downstream from these outfalls – monitoring stations which they admitted were in the Los Angeles and San Gabriel Rivers – indicated the presence of pollutants exceeding the Permit's standards.

Both the district court and the Ninth Circuit rejected respondents' argument, noting that numerous other entities above the monitoring stations also discharged stormwater into the rivers, and that it was necessary for plaintiffs to provide some evidence

that the pollutants at issue stemmed from a District outfall, and not from somewhere else. Indeed, the district court granted summary judgment to petitioner District on this claim, noting that plaintiffs had not provided any evidence to establish any discharge by the District.

Astonishingly, the Ninth Circuit nonetheless reversed, relying on a newly-minted theory of liability, one not argued or relied upon by the parties. Even though respondents admitted that the monitoring stations were located in the Los Angeles and San Gabriel Rivers, the Ninth Circuit held that since the monitoring stations were in channelized portions of the rivers the District maintained for flood control, water flowing out of those channels into "naturally occurring" portions of the rivers downstream constituted a "discharge" from an "outfall" for purposes of finding a permit violation by the District. In sum, the Ninth Circuit held that the rivers lost their character as navigable waters when they were channelized for flood control, and were then transformed back into navigable waters when flowing into "naturally occurring" portions of the rivers.

The Ninth Circuit's unprecedented – and unsupportable – construction of the Clean Water Act is directly contrary to the decisions of this Court and uniformly accepted statutory interpretations defining navigable waters of the United States under the Clean Water Act, or a "discharge" within the meaning of the Act. As a result, it has caused confusion and threatens ongoing disruption with respect to one of

the most fundamental services that public entities provide – stormwater and flood control. It also creates confusion as to the jurisdiction of federal agencies, the EPA and U.S. Army Corps of Engineers, to regulate water bodies as navigable waters. Thus, certiorari is warranted for the following reasons.

1. Review is necessary because the Ninth Circuit's holding that only "naturally occurring" waters may be navigable waters of the United States, and that man-made improvements somehow transforms that status under the Clean Water Act, is directly contrary to the statutory scheme of the Act, the decisions of this Court, as well as other federal courts.

Nothing in the provisions of the Clean Water Act nor accompanying regulations suggests that the status of a body of water as a "navigable water" depends upon whether it is man-made or "naturally occurring." 33 U.S.C. §1362(7); 40 C.F.R. §122.2. In fact, the phrase "naturally occurring" was invented by the Ninth Circuit out of whole cloth and is nowhere referenced in the regulatory scheme.

In *Rapanos v. United States*, 547 U.S. 715 (2006), a sharply divided Court differed on a precise definition of what constituted a navigable water of the United States, but neither of the tests urged by the plurality and concurring opinions turned upon whether a body of water was artificially altered or "naturally occurring." Both opinions expressly recognized that man-made bodies of water could constitute navigable waters. In his concurring opinion in

Rapanos, Justice Kennedy specifically identified the Los Angeles River as fitting the statutory definition, observing that, "it periodically releases water volumes so powerful and destructive that it has been incased in concrete and steel over a length of some 50 miles." 547 U.S. at 769. Not surprisingly, the circuit courts, including the Ninth Circuit itself, have previously recognized that man-made channels may be waters of the United States under the Act. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) [irrigation channels]; *United States v. Eidson*, 108 F.3d 1336, 1342-43 (11th Cir. 1997), *overruled on other grounds*, *United States v. Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007) [man-made storm drainage ditch].

The confusion wrought by the Ninth Circuit's decision is not limited to claims involving the Clean Water Act and municipal stormwater systems. The very premise of the Ninth Circuit's opinion – that the status of a water body as a navigable water may vary depending upon man-made alterations – has an impact across the board on claims under the Clean Water Act since discharge into the navigable waters is a *sine qua non* of federal regulation under the Act. Indeed, the EPA and Army Corps of Engineers derive their authority under the Act from the status of water bodies as navigable waters. The Ninth Circuit's opinion casts doubt on the basic regulatory authority of these agencies.

2. Review is necessary because the Ninth Circuit's decision imposes liability under the Clean

Water Act for a "discharge" of pollutants within a single body of water, in direct contravention of this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In *Miccosukee Tribe*, the Court emphasized that simply transferring water from one portion of a single body of water into another portion cannot constitute the "addition" of pollutants for purposes of the Clean Water Act. *Id.* at 107. Nonetheless, here, the Ninth Circuit has adopted precisely the opposite view, concluding that water flowing from one channelized portion of a river into another portion of the same river constitutes a discharge from a point source and outfall within the meaning of the Clean Water Act. The Ninth Circuit's decision is irreconcilable with *Miccosukee Tribe*.

3. Review is essential in order to provide clear guidance to the EPA, state permitting agencies and regulated municipalities concerning application of the Clean Water Act to improved portions of navigable waters of the United States that serve as flood control systems, and incidentally, municipal separate storm sewer systems. Although petitioner believes that under existing case and statutory authority resolution of the issue should be clear, as the Ninth Circuit's opinion underscores, there is confusion about what transpires when a municipality undertakes improvements within the course of navigable waters of the United States.

The confusion created by the Ninth Circuit's decision imposes a particularly onerous burden on

petitioner Los Angeles County Flood Control District, an entity that, as the Ninth Circuit acknowledges, covers a vast area. It is responsible for safeguarding from flooding and stormwater damage billions of dollars worth of property and the lives of citizens in the most populous county in the United States. It does so by maintaining a flood control system including large portions of the Los Angeles and San Gabriel Rivers – rivers that, by necessity, have been subject to man-made alteration throughout much of their length. Decisions involving expenditure of tens of millions of taxpayer dollars and impacting the lives and property of millions of citizens should not and cannot be based on speculation about the potential legal ramifications of engaging in basic flood control.

Moreover, virtually every major metropolitan area in the country borders a navigable water of the United States and many are subject to the MS4 permitting requirements. Municipalities across the country have modified traditional waters through channelization. By its nature, flood and stormwater control requires advance planning and a massive commitment of public funds and resources. It is vital that local entities be able to assess sooner, rather than later, potential obligations stemming from efforts to alter adjoining rivers, lakes or streams as part of basic flood and stormwater control.

In the nearly 25 years since incorporation of the stormwater permitting requirements in the Clean Water Act, this Court has never addressed the scope of these requirements. As the Ninth Circuit's decision

here underscores, it is essential that the Court now do so.

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT MAN-MADE IMPROVEMENTS TO A NAVIGABLE WATER OF THE UNITED STATES SUCH AS CHANNELIZATION AS PART OF FLOOD CONTROL OR A MUNICIPAL SEPARATE STORM SEWER SYSTEM ALTERS ITS STATUS, IS INCONSISTENT WITH THE PROVISIONS OF THE CLEAN WATER ACT, THIS COURT'S DECISION IN *RAPANOS V. UNITED STATES* AND THE DECISIONS OF OTHER CIRCUITS.

The Clean Water Act regulates the addition of pollutants into the waters of the United States. With respect to stormwater from municipal systems, the Act provides for the issuance of permits to municipalities on an individual or collective basis concerning discharge from municipal separate storm sewer systems – MS4s. 33 U.S.C. §1342(p)(3); 40 C.F.R. §122.26.

The Ninth Circuit held that respondents had established that petitioner had discharged pollutants in excess of standards set forth in the Permit, because exceedances were shown by mass-emissions monitoring stations in portions of the Los Angeles and San Gabriel Rivers that were maintained by petitioner as part of its MS4. The court did not find that respondents had shown that outfalls of petitioner's MS4 into

the rivers upstream of the monitoring stations discharged pollutants exceeding Permit standards into the Los Angeles and San Gabriel Rivers. (App.41-44.) Rather, the court concluded that improvements within the rivers could constitute point sources for purposes of a discharge through an outfall:

> Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in the section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intrastate *man-made* construction – not a *naturally occurring* Watershed River.

(App.44 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App.45.)

Respondents admitted in the district court that the monitoring stations in question were located *in* the Los Angeles and San Gabriel Rivers, respectively.[4] Given Respondents' admission that the monitoring stations were located in the rivers, the Ninth Circuit's conclusion that these portions of the rivers were somehow not navigable waters for purposes of the Clean Water Act was premised solely on its view that because those portions flow through "man-made" construction – not a "naturally occurring Watershed River" – they somehow lost their status as waters of the United States.

The Ninth Circuit's reasoning does not withstand scrutiny. Nothing in the applicable regulatory scheme suggests that a navigable water loses its character as such once man-made improvements are made. Moreover, both this Court, and the lower federal courts, have recognized that man-made alterations to a body

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[4] In their Statement Of Genuine Issues Of Material Fact In Dispute filed in opposition to defendants' motion for summary judgment, plaintiffs admitted that both monitoring stations were in the rivers. Defendants' first "uncontroverted" fact stated: "Plaintiffs allege that rainfall and urban runoff that becomes collected in the flood control system contain pollutants that are in excess of 'water quality standards' adopted by the Regional Board. The plaintiffs base their allegations on samples taken at 'mass emission stations' *located in the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek, and on samples taken at Surfrider Beach.*" (District Court Dkt. 140 at 2, Fact No. 1 (emphasis added).) Plaintiffs' response was as follows: "First sentence: Disputed. . . . Second sentence: Undisputed." (*Id.*)

of water do not change its character for purposes of determining whether it is a navigable water under the Clean Water Act.

A. The Ninth Circuit's Conclusion That Man-Made Alterations To A Navigable Water May Change Its Character For Purposes Of The Clean Water Act Is Unsupported By The Act Itself And Relevant Regulations.

The Clean Water Act regulates the addition of pollutants to "navigable waters" which is defined by 33 U.S.C. section 1362(7), as meaning "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The Act's implementing regulations in turn, define "waters of the United States" to mean:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (b) All interstate waters, including interstate "wetlands";
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, west meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) which are

> or could be used by interstate or foreign travelers for recreational or other purposes; (2) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) which are used or could be used for industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

40 C.F.R. §122.2.

Although the Ninth Circuit cited this regulation to support its conclusion that the man-made nature of the portions of the channels located in the Los Angeles and San Gabriel Rivers somehow altered the rivers' status as navigable waters so there could be a discharge from the District's MS4 within the meaning of the Clean Water Act, the language of the regulation belies that construction. Nowhere in 40 C.F.R. section 122.2 is it stated that a navigable water must be free of man-made improvements. Indeed, nowhere is there any reference to a "naturally occurring" body of water. (*Compare* 40 C.F.R. §122.2 *to* App.44.)

The Ninth Circuit cites no case holding or even suggesting that the status of a body of water as a navigable water changes depending upon whether it has been subject to man-made improvements. While the court cited *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001), nothing in that decision supports the strained proposition urged by the Ninth Circuit. In fact, in *Headwaters*, the Ninth Circuit found that man-made irrigation canals were "waters of the United States." 243 F.3d at 533.

Nor does the fact that the rivers were channelized for flood control purposes somehow alter their status as navigable waters. The Ninth Circuit suggests that because an MS4 *can* be a "point source," channelizing a portion of a river therefore transforms that portion of the river from a navigable water into a point source. (App.42.) This is apparently the basis for the Court's conclusion that "[a]s a matter of law and fact, the MS4 is distinct from the two navigable rivers. . . ." (App.44.)

The Ninth Circuit's analysis does not withstand scrutiny. To be sure, as the district court recognized, as both a factual and legal matter it may be difficult to discern where the rivers leave off and where petitioner's MS4 begins. In fact the EPA itself recognized that it might be difficult to draw a clear line between an MS4 and the navigable waters of the United

States.[5] Yet, review of regulations governing MS4s, particularly in light of the statutory and regulatory definitions of waters of the United States, utterly refutes the Ninth Circuit's suggestion that man-made improvements to navigable waters transform their status so as to allow a discharge under the Act.

40 C.F.R. section 122.26(b)(8), defines a municipal separate storm sewer system as a public owned "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)," "designed or used for collection or conveying stormwater," that "*discharges to waters of the United States.*" *Id.* (emphasis added).

Without a doubt, channelization of the Los Angeles and San Gabriel Rivers was certainly the creation of a system "designed or used for collecting or conveying

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[5] As the EPA noted in the preamble to the proposed MS4 regulations:

> In addition to identifying outfalls from municipal storm sewer systems for the development of a management program to reduce pollutants in stormwater discharges, it is also important to identify the location of such outfalls to clarify where the storm sewer system ends and where waters of the United States begin. In many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system. Permit applicants should refer to the regulatory definition of waters of the United States at 40 C.F.R. § 122.2 for appropriate guidance.

53 Fed. Reg. 49453.

stormwater." 40 C.F.R. §122.26(b)(8)(ii). The channels, however, do not "discharge to waters of the United States." 40 C.F.R. §122.26(b)(8)(i). 40 C.F.R. section 122.26(b)(9), makes this clear when it defines "outfall" to mean:

> a point source as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and *does not include* open conveyances connecting two municipal separate storm sewers, or pipes, tunnels *or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey the waters of the United States.*

40 C.F.R. §122.26(b)(9) (emphasis added).

In short, while petitioner may operate channelized portions of the Los Angeles and San Gabriel Rivers for flood control, as the applicable regulations indicate, this does not mean that the status of the rivers as navigable waters of the United States changed. To the contrary, the regulations make it clear that simply channeling navigable waters for flood control is not a "discharge" through an "outfall" – the rivers retain their status as navigable waters as they flow through the channels.

Moreover, as noted, the EPA has stated that the distinctions between MS4s and navigable waters should be drawn using its regulatory definitions of the term. 53 Fed. Reg. 49453. As previously discussed, that definition nowhere states or even

suggests that such waters must be "naturally occurring," free from man-made improvement. 40 C.F.R. §122.2.

No authority supports the Ninth Circuit's conclusion that man-made improvements, such as a concrete channel, alter the character of a navigable water of the United States so as to remove it from the statutory definition for purposes of the Clean Water Act.

B. The Ninth Circuit's Decision Is Inconsistent With *Rapanos v. United States*, And The Decisions Of Other Federal Courts.

In *Rapanos v. United States*, 547 U.S. 715 (2006), the Court addressed the issue of whether particular wetlands constituted "waters of the United States" under the Clean Water Act.

The Court sharply divided on the construction of the phrase "waters of the United States." The plurality concluded that the phrase included only "relatively permanent, standing or continuous flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739. The plurality further found that the phrase "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.*

Justice Kennedy concurred in the judgment, but rejected the plurality's rationale. Instead, he concluded that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. Justice Kennedy found that wetlands would "possess the requisite nexus" if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

Critically, both the plurality and Justice Kennedy recognized that man-made bodies of water could constitute "waters of the United States" under the Act. As the plurality observed, "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal.'" 547 U.S. at 736 n.7.

In his concurring opinion, Justice Kennedy invoked the Los Angeles River as emblematic of a "water of the United States" and highlighted the fact that it was subject to man-made improvements for virtually all of its length:

> The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. [Citation.] Yet it periodically releases water volumes so powerful and destructive

> that it has been encased in concrete and steel over a length of some 50 miles.

Id. at 769.[6]

The Court's recognition that "navigable waters of the United States" necessarily included man-made or improved water bodies is not surprising. This Court has found that improved waterbodies are "navigable waters," in defining Congress' regulatory authority under the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 170, 172-73 (1979) [private pond, dredged and opened to navigable waters, is a navigable water]. *See also, United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940) [error to determine navigability based on natural conditions only; a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids are required before commercial navigation may be undertaken].

Moreover, the regulations implementing the Rivers and Harbors Act, 33 U.S.C. §401 *et seq.*, provide that artificial channels, even those that are a "major portion" of a river, can constitute a navigable water of the United States. 33 C.F.R §329.8(a)(1)-(2). The regulations also provide that a water body which was "navigable in its natural or improved state . . . retains its character as 'navigable in law' even though

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[6] One author has described the Los Angeles River as "51 miles of concrete." B. Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* at 51 (1999).

it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions." 33 C.F.R. §329.9(a).

The lower federal courts have similarly recognized that navigable waters are not limited to unaltered "naturally occurring" bodies of water. In *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), *overruled on other grounds, United States v. Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007), the court held that a drainage ditch into which the defendant had discharged industrial wastewater was a "navigable water" of the United States within the meaning of the CWA. 108 F.3d at 1339. The court rejected the contention that because the drainage ditch was man-made, it could not constitute a water of the United States for purposes of the Act:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are "man-made makes no difference. . . . That the defendants used them to convey the pollutants without a permit is the matter of importance."

108 F.3d at 1342.

Similarly, in *United States v. Vierstra*, ___ F. Supp. 2d ___, 2011 WL 1064526 (D.Idaho 2011), the court held that a man-made canal constituted a water of the United States because it met both the plurality

standard of *Rapanos* as well as the "significant nexus" requirement of Justice Kennedy's concurring opinion. 2011 WL1064526 at *3-*6.

Also, as noted, the Ninth Circuit itself in *Headwaters v. Talent Irrigation*, 243 F.3d 526, held that an irrigation canal fell within the definition of water of the United States. Similarly, in *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), applying *Rapanos*, the court held that a man-made creek constituted a water of the United States for purposes of the Act. 496 F.3d at 988-91.

It is impossible to square the Ninth Circuit's conclusion that channelizing the Los Angeles and San Gabriel Rivers altered their status as waters of the United States, with the applicable statutory and regulatory authority, the decision of this Court in *Rapanos*, and prior appellate decisions. The Ninth Circuit's departure from what had been previously believed to be established statutory and case authority mandates review by this Court.

C. The Ninth Circuit's Unprecedented Alteration Of The Definition Of What Constitutes A "Navigable Water Of The United States" Has Impact Beyond Regulation Of Stormwater.

The Ninth Circuit's decision here has a direct impact on the manner in which local entities maintain MS4s for purposes of regulation under the Clean Water Act. Nonetheless, because the Act itself addresses the

addition of pollutants to the navigable waters of the United States from all sources, the impact of the Ninth Circuit's opinion goes far beyond regulation of stormwater.

For example, *Headwaters*, *Moses*, *Eidson* and *Vierstra* were all non-stormwater cases but would likely come out differently if the Ninth Circuit's newly invented standard were applied. Moreover, the very authority of the EPA and the Army Corps of Engineers under the Act itself is derived from the status of water bodies as navigable waters.

The EPA has the authority to adopt new and modified water quality standards in "the navigable waters involved" if water quality standards submitted by a state are not consistent with applicable requirements of the Act or the Administrator determines that a revised or new standard is necessary to meet the Act's requirements. 33 U.S.C. §1313(c)(4). Further, both the EPA and states with delegated authority can adopt "total maximum daily loads" (TMDLs) for navigable waters where effluent limitations are not stringent enough to implement water quality standards for such waters. 33 U.S.C. §1313(d).

Likewise, under the Act, the Army Corps of Engineers issues permits for the discharge of dredged or fill material into "navigable waters." 33 U.S.C. §1344(a).

If improvements to a traditional navigable river render the improved sections no longer the original

navigable water, EPA authority to adopt new water quality standards and TMDL programs for those sections, and the Corps' authority to require permits for discharges of dredged and fill material into the improved channels, is called into question.

The Ninth Circuit's patently erroneous decision creates a ripple effect, sowing confusion the entire breadth of the Clean Water Act. It is essential that this Court grant review to bring clarity to a standard that must be applied by local and federal agencies on a daily basis.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING THAT PETITIONER MAY BE LIABLE FOR DISCHARGES RESULTING FROM WATERS OF THE LOS ANGELES AND SAN GABRIEL RIVERS PASSING THROUGH ITS CHANNELS WITHIN THE RIVERS, IS CONTRARY TO *SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE OF INDIANS* WHICH FORECLOSES CLAIMS PREMISED UPON MERE TRANSFERS OF WATER WITHIN A SINGLE BODY OF WATER.

In holding that petitioner was liable for permit violations based upon waters of the Los Angeles and San Gabriel Rivers passing through the concrete channels in the rivers, the Ninth Circuit cited this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Ninth Circuit noted that it was not

necessary to show that petitioner's MS4 added pollutants to the rivers, but rather, it was sufficient that petitioner's concrete channels within the rivers transported water containing pollutants that were then discharged from the channels into lower portions of the rivers. (App.46-47.)

Yet, while the Ninth Circuit correctly cited *Miccosukee Tribe* for the proposition that a "discharge of a pollutant" as defined by 33 U.S.C. section 1362(12), includes point sources that do not themselves generate pollutants, the Court flatly ignored the basic premise of *Miccosukee Tribe* – that a mere transfer of water between two points of a single body of water cannot constitute the "addition of pollutants" to a navigable water of the United States.

In *Miccosukee Tribe*, the issue before the Court was whether the flow of water from a canal into a reservoir a short distance away required a discharge permit under the NPDES. 541 U.S. at 98-99. The lower courts had held that a permit was required, concluding that the two bodies of water were distinct. *Id.* at 96.

Among the issues before this Court was whether a "point source" needed to be the original source of a pollutant in order to require a permit for discharging pollutants into waters of the United States. *Id.* at 105. The Court rejected the contention, concluding that "discharge of a pollutant" under 33 U.S.C. section 1362(12), "includes within its reach point sources that do not themselves generate pollutants." *Id.*

However, the Court agreed with the parties, that if the canal and reservoir were in fact not distinct bodies of water "but instead are two hydrologically indistinguishable parts of a single water body," no permit would be required. *Id.* at 109-10. As the Court explained:

> The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in [*Catskill Mountains Chapter of*] *Trout Unlimited, Inc.* [*v. New York,*] 273 F.3d 481, 492 (2d Cir. 2001), "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'"

Id. at 95, 109-10.

Because the record did not contain enough information for the Court to determine whether the canal and reservoir were a single body of water, or distinct bodies of water, the Court remanded for further proceedings. 541 U.S. at 112.

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Court reaffirmed that "[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a 'discharge of a pollutant' within the meaning of §402 [citation] and the Court accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same

water body, pumping water from one into the other cannot constitute an "addition" of pollutants'. . . ." 547 U.S. at 381.

Moreover, as previously noted, the federal regulations, consistent with this Court's view in *Miccosukee Tribe*, make it clear that an "outfall" or a "point source" with respect to an MS4 "does not include open conveyances connecting to municipal separate storm sewers, or pipes, tunnels or other conveyances *which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.*" 40 C.F.R. §122.26(9) (emphasis added).

Notwithstanding the Court's clear statement in *Miccosukee Tribe*, the Ninth Circuit's opinion does not even address the issue of whether the flow of Los Angeles and San Gabriel River waters through concrete channels and into allegedly "naturally occurring" waters can be squared with *Miccosukee Tribe*'s clear holding that there can be no discharge for purposes of permit requirements under those circumstances. The Ninth Circuit's silence with respect to this issue is inexplicable, given that petitioner pointed out this inconsistency with *Miccosukee Tribe* in its petition for rehearing.

The Ninth Circuit's decision calls into question the basic holding of *Miccosukee Tribe* by finding that man-made channels or other improvements within a river that is a navigable water may constitute a "point source" requiring an NPDES permit,

even though the channel merely conveys water from one portion of the river to another. The result is again confusion both with respect to how local entities may operate MS4s and, more generally, how parties are to assess permit requirements where, at the end of the day, the point source merely conveys water within a single water of the United States. For this reason, too, review is warranted.

III. REVIEW IS WARRANTED TO PROVIDE CLEAR GUIDELINES ON FUNDAMENTAL PROVISIONS OF THE CLEAN WATER ACT AND SPECIFIC PROVISIONS CONCERNING REGULATION OF STORMWATER.

The Ninth Circuit's decision here has thrown confusion into what had been previously settled principles concerning application of the Clean Water Act. The Ninth Circuit's suggestion that only "naturally occurring" bodies of water may be navigable waters of the United States and that man-made alterations somehow transform the status of a body of water, is contrary to the decisions of both this Court and other circuit courts, and indeed contrary to prior Ninth Circuit authority.

Similarly, the Ninth Circuit's conclusion that water flowing from the Los Angeles and San Gabriel Rivers through man-made channels comprising part of petitioner's MS4 can nonetheless constitute a discharge from a point source when such waters exit into

"naturally occurring" portion of the rivers, flies in the face of this Court's decision in *Miccosukee Tribe*.

As this Court recognized in intervening in both *Rapanos* and *Miccosukee Tribe*, what constitutes a navigable water of the United States or the discharge of a pollutant within the meaning of the Clean Water Act are fundamental inquiries that require clear standards as public entities struggle to apply them on a daily basis. These are ongoing, important questions that necessarily mandate resolution.

In addition, the Ninth Circuit's departure from principles articulated by this Court is compounded by a lack of clarity with respect to the provisions of the Clean Water Act as they relate to municipal separate storm sewer systems. This Court has never addressed application of the Clean Water Act to MS4s. While petitioner submits that the resolution of the issues presented in this case should be controlled by the Court's previous constructions of the Act, as the Ninth Circuit's decision reflects, there is clearly confusion in this area. As noted, the EPA itself, in proposing the initial regulations governing MS4s, observed that there might be difficulties in determining where an MS4 ends and navigable waters of the United States begin. *See*, *supra*, text accompanying note 5.

Municipalities across the United States that operate MS4s are subject to NPDES permitting requirements. Control of flood and stormwater is among the most vital functions performed by public entities to

safeguard the lives and property of their citizens. Few functions have a greater potential impact on the overall welfare of a community and demand expenditure of a proportionally large amount of public funds.

The standards governing MS4s affect every major city in the United States with a separate storm system. Yet, even if the Ninth Circuit's decision were confined to the Los Angeles area, its impact would be enormous. As the decision acknowledges, the area served by the Flood Control District is vast, encompassing 84 cities and various unincorporated areas within the County of Los Angeles. (App.6-7.) For basic public safety, the District, along with other governmental entities, has engaged in substantial modification of the Los Angeles and San Gabriel Rivers.[7]

By necessity, the District must expend substantial time and money in planning and undertaking improvements to the flood control system and its operations – decisions that require an understanding of all potential obligations. Quite simply, a failure to address the uncertainty created by the Ninth Circuit's

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[7] Prior to these extensive man-made alterations, the Los Angeles River routinely overflowed its banks, resulting in devastating floods and loss of life at regular intervals – in 1884, 1886, 1889, 1914, and 1938. B. Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* at 158-60, 162-64, 167-68, 215-16. Climate and geology create the river's unique potential for devastating flooding. Occasional catastrophic rainfall and close proximity to steep mountains combine to create particularly fast flowing water – up to 45 miles per hour during storms. *Id.* at 224, 299. It is known, for good reason, as a "fifty-one mile storm drain." *Id.* at 173.

opinion will have a direct impact on the expenditure of tens of millions of dollars and decisions concerning the welfare of millions of citizens within the County of Los Angeles.

Finally, given the paucity of case law interpreting the Clean Water Act provisions concerning MS4s, the Ninth Circuit's decision will have an unduly negative impact on municipalities across the country. This is not an issue that can await further litigation in the appellate courts – flood control planning must and does occur on a daily and immediate basis. It is vital that municipalities know sooner rather than later what their potential exposure may be in undertaking their basic duties of flood and stormwater control. It is essential that this Court grant review.

CONCLUSION

For the foregoing reasons, petitioner submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor,

Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA

ORDER and OPINION

Appeal from the United States District Court for the Central District of California
A. Howard Matz, District Judge, Presiding

Argued and Submitted
December 10, 2010 – Pasadena, California

Filed July 13, 2011

ORDER

This Court's Opinion, filed March 10, 2011, and published at 636 F.3d 1235 (9th Cir. 2011), is withdrawn and replaced by the attached Opinion.

With this filing, the panel has voted unanimously to deny Appellees' petition for panel rehearing. Judge Pregerson and Judge M. Smith have voted to deny Appellees' petition for rehearing en banc, and Judge Holland so recommends.

The full court has been advised of the Opinion and petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Accordingly, Appellees' petition for rehearing or for rehearing en banc is DENIED.

No further petitions for rehearing or rehearing en banc will be entertained in this case.

OPINION

Before: Harry Pregerson, and
Milan D. Smith, Jr., Circuit Judges, and
H. Russel Holland, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

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Gregory Thomas Broderick, Downey Brand, LLP, Sacramento, California, for amicus curiae California State Association of Counties.

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* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

Kamala D. Harris, Attorney General of California; Kathleen A. Kenealy, Senior Assistant Attorney General; James R. Potter, Jennifer Novak, Deputy Attorneys General, Office of the California Attorney General, Los Angeles, California, for amicus curiae California Regional Water Quality Control Board, Los Angeles Region.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq.* Plaintiffs contend that Defendants-Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers – the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers) – exceed the limits allowed in a National Pollutant Discharge Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties

agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with respect to the evidence of discharges by the District into two of the Watershed Rivers – the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers. Similarly, Plaintiffs did not delineate how

stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some

unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system. The municipalities in the District operate ms4s[1] to collect and channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s

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[1] Under Federal Regulations, an ms4 is:

> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity . . .
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW). . . .

40 C.F.R. § 122.26(b)(8).

are "highly interconnected" because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4).[2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the MS4 system and the locations of all storm drain connections are not known exactly because a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

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[2] Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); *see Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (characterizing "discharge" as "'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place

limits on the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee Tribe*, 541 U.S. at 102; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' . . . *from a 'point source'* into the navigable waters of the United States'" unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (describing NPDES permitting system). An NPDES permit requires its holder – the "permittee" – to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated – "effluent limitations" and "water quality standards." *Arkansas v. Oklahoma*, 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v. Union Oil Co. of Calif.*, 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources

into navigable waters. . . ." 33 U.S.C. § 1362(11). An effluent-limitation guideline is determined in light of "'the best practicable control technology currently available.'" *Union Oil*, 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil*, 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1993); *see also* Cal. Water Code § 13050(f) ("'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA*, 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses

for the waters of the United States and water quality criteria for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma*, 503 U.S. at 101. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Id.*

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively the

Permittees or Co-Permittees).[3] *See City of Arcadia v. State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240-41 (Cal. Ct. App. 2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities . . . over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los

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[3] "Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. § 122.26(b)(1).

Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia*, 119 Cal. Rptr. 3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as all surface water bodies in the Los Angeles Region that are identified in the Basin Plan. Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited. The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coliform bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into the

MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit, in Part 2.3, provides that Permittees "shall comply" with the MS4 discharge prohibitions, set forth in Parts 2.1 and 2.2, "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of this Order. . . ." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law." Part 2.3 further provides that "[i]f exceedances of Water Quality Objectives or Water Quality Standards [ ] persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit," Permittees "shall assure compliance with discharge prohibitions and

receiving water limitations" by engaging in an "iterative process" procedure:

> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report . . . to the Regional Board that describes [Best Management Practices (BMPs)] that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards.
>
> . . .
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> [Part 2.4] So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or

> recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

Part 3 of the Permit, titled "Storm Water Quality Management Program (SQMP) Implementation," provides that "[e]ach Permittee shall, at a minimum, implement the SQMP." Part 3.A.3 requires Permittees to "implement additional controls, where necessary, to reduce the discharge of pollutants in storm water to the [Maximum Extent Practicable (MEP)]." Part 3.B requires the implementation of BMPs by the Permittees. Part 3.G specifies that each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and the Permittees are directed to develop storm-water and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations).

Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476-78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel."[4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage"

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[4] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed July 6, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed July 6, 2011).

of 825 square miles, as the Los Angeles River is the largest watershed outlet in the County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles.[5]

C. Water-Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum, copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days,

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[5] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed July 6, 2011).

including 29 days where the fecal coliform bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

> (1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.
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> (2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

(4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial storm-water permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v. County of Los Angeles*, No. 08 Civ. 1467 (AHM), 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds*, 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.*, the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed. R. Civ. P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citing *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances.

I. Whether Exceedances at Mass-Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES permitting program is the "centerpiece" of the Clean Water Act and the primary method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997); *see also Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986-90 (9th Cir. 1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009)

(citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175-76 (D.C. Cir. 1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River*, 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates*, 56 F.3d at 982. As described *supra*, the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."

Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra*, relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of

any Permittee and, therefore, cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or an individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits." Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed. Reg. 47,990, 48,037-38 (Nov. 16, 1990)).

As we detail *infra*, neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal stormwater context. In fact, since the inception of the NPDES, Congress

has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub. L. 92-500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977); *see also Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically exempting "discharges from a number of classes of point sources . . . including . . . separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." *Costle*, 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle*. *Id.* at 1376-77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority

to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA*, 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed. Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia*, ms4s. *See Defenders of Wildlife*, 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]") (internal citations omitted); *see also* 55 Fed. Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA*, 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1081-82 (9th Cir. 2011) (citing 33 U.S. § 1342(p)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA*, 966 F.2d at 1296. "Phase I" included "five categories of storm-water discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown*, 640 F.3d at 1082 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges . . .
>
> (2) . . .
>
> . . .
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) *A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.*

> (D) *A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250, 000.*
>
> (E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra*, the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting

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[6] *See* 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

requirement at the municipal level to ease the burden of administering the program. *Brown*, 640 F.3d at 1085-86. That assumption of municipal control is found in the Permit at issue here – Part 3.G.2 of the Permit states that "Permittees shall possess adequate legal authority to . . . [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their storm-water discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us – "Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers . . . [and] intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits" – does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site-Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed. Reg. 48,037-38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA *mandates* that permits for discharges from municipal separate storm sewers *shall require controls*

> *to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed. Reg. 48,038 (emphasis added). The use of such language – employing "mandates" and commands to regulate – hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why water-quality standards may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass-Emissions Violations

Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforcement mechanism against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose – as Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl. Advocates*, 56 F.3d at 986 (emphasis in original). We used these words and emphasized *all* permit conditions because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.'" *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates*, we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981-82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988-89. The overflows from the Portland sewer system were "caused primarily by uncontrollable events – *i.e.*, the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards themselves as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988-90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement based on water-quality

standards. *Id.* at 986. However, troubled by the "'almost total lack of enforcement'" under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Our prior case law emphasizes that NPDES permit enforcement is not scattershot – each permit term is simply enforced as written. *See Union Oil*, 813 F.2d at 1491 ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (D. Ark. 1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil*, Congress structured the CWA to function by self-monitoring and self-reporting of violations to "'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.'" 813 F.2d at 1492 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

The plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include "[a]ssessing compliance with this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.*, 426 U.S. at 223 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct to note that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Although Defendants argue that compliance with other Permit provisions, in particular Part 2.3's iterative process, forgives violations of the discharge prohibitions in Parts 2.1 and 2.2, no such "safe harbor" is

present in this Permit.[7] Rather, Part 2.3 first provides that Permittees shall comply with the Water Quality Standards "through timely implementation of control measures and other actions . . . in accordance with the SQMP and its components." Part 2.3 clarifies that Parts 2 and 3 of the Permit interact, but it offers no textual support for the proposition that compliance with certain provisions shall forgive non-compliance with the discharge prohibitions. As opposed to absolving noncompliance or exclusively adopting the MEP standard, the iterative process ensures that if water quality exceedances "persist," despite prior abatement efforts, a process will commence whereby a responsible Permittee amends its SQMP. Given that Part 3 of the Permit states that SQMP implementation is the "minimum" required of each Permittee, the discharge prohibitions serve as additional requirements that operate as enforceable water-quality-based performance standards required by the Regional Board. *See e.g., Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 141 (Cal. Ct. App. 2004) (rejecting arguments

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[7] We also note, as did the district court, that when the validity of this Permit was challenged in California state court by various municipal entities, including the District, the argument that the Permit's discharge prohibitions were invalid for not containing a "safe harbor" was rejected. *See In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 4-5, 7 (L.A. Super. Ct. Mar. 24, 2005) ("In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2. in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard.").

that "under federal law the 'maximum extent practicable' standard is the 'exclusive' measure that may be applied to municipal storm sewer discharges and [that] a regulatory agency may not require a Municipality to comply with a state water quality standard if the required controls exceed a 'maximum extent practicable' standard").

Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee must comply with all terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act . . . and is grounds for enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator [of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)[.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass . . . for each pollutant limited in the permit," and volume of effluent discharged); *Ackels v.*

EPA, 7 F.3d 862, 866 (9th Cir. 1993) ("[T]he Act grants EPA broad authority to require NPDES permitees [*sic*] to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling

> conducted at or near Defendants' outflows. . . . However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> . . .
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe*, 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically

states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited*."

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, *inter alia*, "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the

exceedances were observed." Plaintiffs counter that the Monitoring Stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology – upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys[8] by demanding that

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[8] Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:

> *Question*: What if those flows [which exceeded water-quality standards] were so polluted with oil and grease that they were on fire as they came out of the

(Continued on following page)

Plaintiffs engage in the Sisyphean task of testing particular storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

Despite shortcomings in each side's arguments, there is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River. *See Headwaters*, 243 F.3d

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system? Would your view be the same, that the District is not contributing to exceedances?

Answer: That the system the District maintains is not contributing to, yes.

at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.'" (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26(9) ("Outfall means a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States. . . ."). The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation,"[9] the Clean Water Act does

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[9] This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g., Miss. River Revival v. Adm'r, E.P.A.*, 107 F. Supp. 2d 1008, 1009 (D. Minn. 2000) ("These lawsuits involve the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the

(Continued on following page)

not distinguish between those who add and those who convey what is added by others – the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge*." *Huffman*, 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant . . . includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State [or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed. Reg. 47,991. Finally, the Supreme Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12)

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storm water discharge is subject to the NPDES permitting requirements.").

. . . *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105 (emphasis added).

Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the inter-workings or connections of this complicated drainage system. We recognize that both the Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm

drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g.*, *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 846-47 (5th Cir. 1983) ("We wish to emphasize most strongly that it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts. . . . Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions such as this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from

the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings consistent with this opinion. The district court's grant of summary judgment for Defendant District

on Claims 1 and 4 and for Defendant County on all Watershed Claims is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each side shall bear its own costs.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC.; SANTA MONICA BAYKEEPER,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; MICHAEL ANTONOVICH, in his official capacity as Supervisor; YVONNE BURKE, in her official capacity as Supervisor; GLORIA MOLINA, in her official capacity as Supervisor; ZEV YAROSLAVSKY, in his official capacity as Supervisor; DEAN D. EFSTATHIOU, in his official capacity as Acting Director of Los Angeles County Department of Public Works; DON KNABE, in his official capacity as Supervisor,

Defendants-Appellees.

No. 10-56017

D.C. No. 2:08-cv-01467-AHM-PLA

OPINION

Appeal from the United States District Court for the Central District of California Howard Matz, District Judge, Presiding

Argued and Submitted
December 10, 2010 – Pasadena, California

Filed March 10, 2011

Before: Harry Pregerson, and
Milan D. Smith, Jr., Circuit Judges, and
H. Russel Holland, Senior District Judge.*

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Aaron Colangelo, Esquire, Natural Resources Defense Council, Washington, D.C.; Daniel Cooper, Esquire, Lawyers for Clean Water, San Francisco, California, for plaintiffs-appellants Natural Resources Defense Council, Inc. and Santa Monica Baykeeper.

Andrea Sheridan Ordin, Esquire, Judith A. Fries, Esquire, Laurie Dods, Esquire, Los Angeles County Department of County Counsel, Los Angeles, California; Howard Gest, Esq., David W. Burhenn, Esq., Burhenn & Gest LLP, Los Angeles, California, for defendants-appellees County of Los Angeles, et al.

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* The Honorable H. Russel Holland, Senior United States District Judge for the District of Alaska, sitting by designation.

OPINION

M. SMITH, Circuit Judge.

Plaintiffs-Appellants Natural Resources Defense Council and Santa Monica Baykeeper appeal the district court's grant of summary judgment in favor of two municipal entities that Plaintiffs allege are discharging polluted stormwater in violation of the Federal Water Pollution Control Act (the Clean Water Act, Act, or CWA), 86 Stat. 816, codified as amended at 33 U.S.C. § 1251 *et seq.* Plaintiffs contend that Defendants-Appellees County of Los Angeles (County) and Los Angeles County Flood Control District (District) are discharging polluted urban stormwater runoff collected by municipal separate storm sewer systems (ms4) into navigable waters in Southern California. The levels of pollutants detected in four rivers – the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek (collectively, the Watershed Rivers) – exceed the limits allowed in a National Pollutant Discharge Elimination System (NPDES) permit which governs municipal stormwater discharges in the County. Although all parties agree that numerous water-quality standards have been exceeded in the Watershed Rivers, Defendants contend that there is no evidence establishing their responsibility for, or discharge of, stormwater carrying pollutants to the rivers. The district court agreed with Defendants and entered a partial final judgment.

We conclude that the district court erred with respect to the evidence of discharges by the District into two of the Watershed Rivers – the Los Angeles River and San Gabriel River. Specifically, Plaintiffs provided evidence that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by the District and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers. Accordingly, Plaintiffs were entitled to summary judgment on the District's liability for discharges into the Los Angeles River and San Gabriel River, and therefore we reverse the district court's grant of summary judgment in favor of the District on these claims.

Plaintiffs, however, failed to meet their evidentiary burden with respect to discharges by the District into the Santa Clara River and Malibu Creek. Plaintiffs did not provide evidence sufficient for the district court to determine if stormwater discharged from an ms4 controlled by the District caused or contributed to pollution exceedances located in these two rivers. Similarly, Plaintiffs did not delineate how stormwater from ms4s controlled by the County caused or contributed to exceedances in any of the Watershed Rivers. Accordingly, we affirm the district court's grant of summary judgment in favor of the Defendants on these claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Stormwater Runoff in Los Angeles County

A. The MS4

Stormwater runoff is surface water generated by precipitation events, such as rainstorms, which flows over streets, parking lots, commercial sites, and other developed parcels of land. Whereas natural, vegetated soil can absorb rainwater and capture pollutants, paved surfaces and developed land can do neither. When stormwater flows over urban environs, it collects "suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants[.]" *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003). This runoff is a major contributor to water pollution in Southern California rivers and the Pacific Ocean and contributes to the sickening of many ocean users each year.

The County is a sprawling 4,500 square-mile amalgam of populous incorporated cities and significant swaths of unincorporated land. The District is a public entity governed by the Los Angeles County Board of Supervisors and the Department of Public Works. The District is comprised of 84 cities and some unincorporated areas of the County. The County and the District are separate legal entities.

In the District, stormwater runoff is collected by thousands of storm drains located in each municipality and channeled to a storm sewer system. The municipalities in the District operate ms4s[1] to collect and channel stormwater. The County also operates an ms4 for certain unincorporated areas. Unlike a sanitary sewer system, which transports municipal sewage for treatment at a wastewater facility, or a combined sewer system, which transports sewage and stormwater for treatment, ms4s contain and convey only untreated stormwater. *See* 40 C.F.R. § 122.26(a)(7), (b)(8). In the County, municipal ms4s are "highly interconnected" because the District allows each municipality to connect its storm drains to

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[1] Under Federal Regulations, an ms4 is:

> a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body . . . having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity . . .
>
> (ii) Designed or used for collecting or conveying storm water;
>
> (iii) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW). . . .

40 C.F.R. § 122.26(b)(8).

the District's extensive flood-control and storm-sewer infrastructure (the MS4).[2] That infrastructure includes 500 miles of open channels and 2,800 miles of storm drains. The length of the [MS4] system, and the locations of all storm drain connections, are not known exactly, as a comprehensive map of the storm drain system does not exist. While the number and location of storm drains are too numerous to catalogue, it is undisputed that the MS4 collects and channels stormwater runoff from across the County. That stormwater is channeled in the MS4 to various watercourses including the four Watershed Rivers at the heart of this litigation: the Los Angeles River, the San Gabriel River, the Santa Clara River, and Malibu Creek. The Watershed Rivers drain into the Pacific Ocean at Santa Monica Bay, Los Angeles Harbor, and Long Beach Harbor.

The gravamen of Plaintiffs' action is that by allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers, and eventually into the Pacific Ocean, Defendants have violated the Clean Water Act.

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[2] Throughout this Opinion, reference is made to both "ms4" and "*the* MS4." The former is a generic reference to municipal separate storm sewer systems without regard to their particular location, while the latter specifically refers to the flood control and storm-sewer infrastructure described *supra* that exists in the County and is controlled by the District.

B. The Clean Water Act and NPDES Permit

The Clean Water Act is the nation's primary water-pollution-control law. The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "To serve those ends, the Act prohibits 'the discharge of any pollutant by any person' unless done in compliance with some provision of the Act." *S. Fl. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004) (quoting 33 U.S.C. § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12); see *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (characterizing "discharge" as "'add[ing]' pollutants from the outside world to navigable water").

Under the Clean Water Act, ms4s fall under the definition of "point sources." 33 U.S.C. § 1362(14). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

A person or entity wishing to add pollutants to navigable waters must comply with the NPDES, which "requires dischargers to obtain permits that place limits on the type and quantity of pollutants

that can be released into the Nation's waters." *Miccosukee Tribe,* 541 U.S. at 102; 33 U.S.C. § 1342(a), (p). The Act "generally prohibits the 'discharge of any pollutant' . . . *from a 'point source'* into the navigable waters of the United States' " unless the point source is covered by an NPDES permit. *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir. 1999) (quoting 33 U.S.C. §§ 1311(a), 1362(12)(A)) (emphasis added); *see also Arkansas v. Oklahoma,* 503 U.S. 91, 101-02 (1992) (describing NPDES permitting system). An NPDES permit requires its holder – the "permittee" – to follow the requirements of numerous Clean Water Act provisions, *see* 33 U.S.C. § 1342(a), which include effluent limitations, water-quality standards, water monitoring obligations, public reporting mechanisms, and certain discharge requirements. *See id.* §§ 1311, 1312, 1314, 1316, 1317, 1318, 1343.

The Act uses two water-quality-performance standards, by which a discharger of water may be evaluated – "effluent limitations" and "water quality standards." *Arkansas v. Oklahoma,* 503 U.S. at 101 (citing 33 U.S.C. §§ 1311, 1313, 1314); *see also Sierra Club v. Union Oil Co. of Calif.,* 813 F.2d 1480, 1483 (9th Cir. 1987), *vacated on other grounds,* 485 U.S. 931 (1988), *reinstated,* 853 F.2d 667 (9th Cir. 1988). An effluent limitation is "any restriction established by a State or the [Environmental Protection Agency (EPA)] Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. . . ." 33 U.S.C. § 1362(11). An

effluent-limitation guideline is determined in light of "'the best practicable control technology currently available.'" *Union Oil,* 813 F.2d at 1483 (quoting 33 U.S.C. § 1311(b)(1)(A)).

Water-quality standards "are used as a supplementary basis for effluent limitations, so that numerous dischargers, despite their individual compliance with technology-based limitations, can be regulated to prevent water quality from falling below acceptable levels." *Union Oil,* 813 F.2d at 1483 (citing *EPA v. Calif. ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 n.12 (1976) (hereafter *EPA v. Calif.*)). Water-quality standards are developed in a two-step process. First, the EPA, or state water authorities establish a waterway's "beneficial use." *Natural Res. Def. Council, Inc. v. EPA,* 16 F.3d 1395, 1400 (4th Cir. 1993); *see also* Cal. Water Code § 13050(f) ("'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not limited to, domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."). Once the beneficial use is determined, water quality criteria that will yield the desired water conditions are formulated and implemented. *See NRDC v. EPA,* 16 F.3d at 1400; *see also* 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water

quality criteria for such waters based upon such uses.").

Unlike effluent limitations, which are promulgated by the EPA to achieve a certain level of pollution reduction in light of available technology, water-quality standards emanate from the state boards charged with managing their domestic water resources. *See Arkansas v. Oklahoma,* 503 U.S. at 101. The EPA gives the states guidance in drafting water-quality standards and "state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Id.*

The EPA has authorized the State of California to develop water-quality standards and issue NPDES permits. Under the Porter-Cologne Water Quality Control Act, California state law designates the State Water Resources Control Board and nine regional boards as the principal state agencies for enforcing federal and state water pollution law and for issuing permits. *See* Cal. Water Code §§ 13000, 13001, 13140, 13240, 13370, 13377. Beginning in 1990, the California State Water Resources Control Board for the Los Angeles Region (the Regional Board) issued an NPDES permit (the Permit) to cover stormwater discharges by the County, the District, and 84 incorporated municipalities in the County (collectively

the Permittees or Co-Permittees).[3] *See City of Arcadia v. State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240-41 (Cal. Ct. App. 2010). The Permit was renewed in 1996, 2001, 2006, and 2007.

The Permit is divided into two broad sections: findings by the Regional Board and an order authorizing and governing the Permittees' discharges (Order). The findings cover many introductory and background subjects, including a history of NPDES permitting in the County; applicable state and federal laws governing stormwater discharges; studies conducted by the County and researchers about the deleterious effects of polluted stormwater; coverage and implementation provisions; and guidelines for administrative review of Permit provisions. The Permit covers "all areas within the boundaries of the Permittee municipalities . . . over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board." In total, the Permit governs municipal stormwater discharge across more than 3,100 square miles of land in the County.

The Permit relates the many federal and state regulations governing stormwater discharges to Southern California's watercourses. Among these regulations is the Water Quality Control Plan for the Los

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[3] "Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. § 122.26(b)(1).

Angeles Region (the Basin Plan). Under California law, the regional boards' "water quality plans, called 'basin plans,' must address the beneficial uses to be protected as well as water quality objectives, and they must establish a program of implementation." *City of Arcadia*, 119 Cal. Rptr. 3d at 240 (quoting *City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 865 (Cal. 2005) (citing Cal. Water Code § 13050(j))). The Permit provides that "[t]he Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving water in Los Angeles County." "Receiving waters" are defined as "all surface water bodies in the Los Angeles Region that are identified in the Basin Plan." "Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited." The Permit incorporates and adopts the Basin Plan, which sets limits on bacteria and contaminants for the receiving waters of Southern California. The water-quality standards limit, among other pollutants, the levels of ammonia, fecal coliform bacteria, arsenic, mercury, and cyanide in Southern California's inland rivers.

The Permit contains myriad prohibitions and conditions regarding discharges into and from the MS4. Under Part 1, the Permittees are directed to "effectively prohibit non-storm water discharges into

the MS4 and watercourses" unless allowed by an NPDES permit. Under Part 2, titled "Receiving Water Limitations," "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." The "Water Quality Standards and Water Quality Objectives" are defined in the Permit as "water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federal approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges."

The Permit provides that Permittees "shall comply" with the MS4 discharge prohibitions "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program (SQMP)] and its components and other requirements of this Order. . . ." The SQMP includes "descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law." The Permit sets out a procedure to ensure Permittee compliance when any water-quality standards are breached:

> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the

> Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report . . . to the Regional Board that describes [Best Management Practices (BMPs)] that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards.
>
> . . .
>
> c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.
>
> d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.
>
> . . . So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

When a violation arises, a Permittee must adhere to the procedures in its Compliance Report until the exceedances abate.

The Permit requires the Permittees, *inter alia,* to reduce pollution in stormwater to the "maximum extent practicable [(MEP)]." Each Permittee is vested with the "necessary legal authority" to prohibit discharges to the MS4, and is directed to develop stormwater and urban runoff ordinances for its jurisdiction.

The Permit has both self-monitoring and public-reporting requirements, which include: (1) monitoring of "mass emissions" at seven mass emission monitoring stations; (2) Water Column Toxicity Monitoring; (3) Tributary Monitoring; (4) Shoreline Monitoring; (5) Trash Monitoring; (6) Estuary Sampling; (7) Bioassessment; and (8) Special Studies.

This case concerns high levels of pollutants, particularly heavy metals and fecal bacteria, identified by mass-emissions monitoring stations for the four Watershed Rivers (the Monitoring Stations). Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a waterbody. According to the Permit, the purpose of mass-emissions monitoring is to (1) estimate the mass emissions from the MS4, (2) assess trends in the mass emissions over time, and (3) determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to the applicable standards in the Basin Plan. The Permit establishes that the Principal Permittee, which is the District, shall monitor the mass-emissions stations. The Permit requires that mass-emission readings be taken five times per year for the Watershed Rivers.

The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by the District. *See* Excerpts of Record at 11; *see also* Dist. Ct. Docket No. 101: Declaration of Aaron Colangelo Ex. N: Deposition of Mark Pestrella at 476-78. The Los Angeles River Monitoring Station is located in the City of Long Beach in "a concrete lined trapezoidal channel."[4] The Los Angeles River Monitoring Station measures "total upstream tributary drainage" of 825 square miles, as the Los Angeles River is the largest watershed outlet in the County. The San Gabriel River Monitoring Station is located in Pico Rivera and measures an upstream tributary watershed of 450 square miles.

The Malibu Creek Monitoring Station is not located within a channelized portion of the MS4 but at an "existing stream gage station" near Malibu Canyon Road. It measures 105 miles of tributary watershed. The Santa Clara River Monitoring Station is located in the City of Santa Clara and measures an upstream tributary area of 411 square miles.[5]

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[4] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf (last accessed Mar. 2, 2011); *see also* "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed Mar. 2, 2011).

[5] "Section Two: Site Descriptions," Los Angeles Cnty. Dept. of Pub. Works, available at http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (last accessed Mar. 2, 2011).

C. Water-Quality Exceedances in the Watershed Rivers

Between 2002 and 2008, the four Monitoring Stations identified hundreds of exceedances of the Permit's water-quality standards. These water-quality exceedances are not disputed. For instance, monitoring for the Los Angeles and San Gabriel Rivers showed 140 separate exceedances. These included high levels of aluminum, copper, cyanide, fecal coliform bacteria, and zinc in the rivers. Further, ocean monitoring at Surfrider Beach showed that there were 126 separate bacteria exceedances on 79 days, including 29 days where the fecal coliform bacteria limit was exceeded.

The District admits that it conveys pollutants via the MS4, but contends that its infrastructure alone does not generate or discharge pollutants. According to Defendants, the District conveys the collective discharges of the numerous "up-sewer" municipalities. Moreover, Defendants identify thousands of permitted dischargers whose pollutants are reaching the Watershed Rivers:

> (1) Los Angeles River watershed: (a) at least 1,344 NPDES-permitted industrial and 488 construction stormwater dischargers allowed to discharge during the time period relevant to the case; (b) three wastewater treatment plants; and (c) 42 separate incorporated cities within the Los Angeles River watershed discharging into the river upstream of the mass emission station.

(2) San Gabriel River watershed: (a) at least 276 industrial and 232 construction stormwater dischargers during the relevant time period; (b) at least 20 other industrial dischargers that were specifically permitted to discharge pollutants in excess of the water quality standards at issue in this action; (c) two wastewater treatment plants; and (d) 21 separate incorporated cities discharging into the watershed upstream of the mass emission station.

(3) Santa Clara River watershed: (a) eight dischargers permitted by industrial wastewater discharge permits where the limits in the permit allowed discharges of pollutants at concentrations higher than the water quality standards which plaintiffs contend were exceeded; (b) approximately 26 industrial and 187 construction stormwater dischargers; and (c) the Saugus Wastewater Reclamation Plant.

(4) Malibu Creek watershed: (a) seven industrial wastewater dischargers; and (b) at least five permitted discharges under the general industrial stormwater permit and at least 16 construction sites permitted to discharge under the general construction stormwater permit.

II. Proceedings before the District Court

Based on data self-reported by Defendants, Plaintiffs catalogued the water-quality exceedances

in the Watershed Rivers. Beginning on May 31, 2007, Plaintiffs sent a series of notice letters to Defendants concerning these exceedances. On March 3, 2008, based on these purported violations, Plaintiffs commenced this citizen-enforcement action. After the district court dismissed certain elements of Plaintiffs' initial complaint because notice of the Permit violations was defective, Plaintiffs sent Defendants an adequate notice letter on July 3, 2008.

Plaintiffs filed the First Amended Complaint (Complaint) on September 18, 2008. In the Complaint, Plaintiffs assert six causes of action under the Clean Water Act. Only the first four of Plaintiffs' claims, which relate to the exceedances in the Watershed Rivers, and which the district court designated the "Watershed Claims," are before us. The first three Watershed Claims allege that, beginning in 2002 or 2003, the District and the County caused or contributed to exceedances of water-quality standards in the Santa Clara River (Claim 1), the Los Angeles River (Claim 2), and the San Gabriel River (Claim 3), in violation of 33 U.S.C. §§ 1311(a), 1342(p). The fourth Watershed Claim alleges that, beginning in 2002, Defendants caused or contributed to exceedances of the water quality standards and violated the Total Maximum Daily Load (TMDL) limits in Malibu Creek. Plaintiffs' four Watershed Claims each rest on the same premise: (1) the Permit sets water-quality limits for each of the four rivers; (2) the mass-emissions stations have recorded exceedances of those standards; (3) an exceedance is non-compliance with the

Permit and, thereby, the Clean Water Act; and (4) Defendants, as holders of the Permit and operators of the MS4, are liable under the Act.

Before the district court, Plaintiffs moved for partial summary judgment on two of the Watershed Claims: the Los Angeles River and San Gabriel River exceedances. Defendants cross-moved for summary judgment on all four Watershed Claims.

In a March 2, 2010 Order, the district court denied each cross-motion for summary judgment on the Watershed Claims. *NRDC v. County of Los Angeles*, No. 08 Civ. 1467 (AHM), 2010 WL 761287 (C.D. Cal. Mar. 2, 2010), *amended on other grounds*, 2011 WL 666875 (C.D. Cal. Jan. 27, 2011). Although the district court accepted Plaintiffs' arguments that the Permit "clearly prohibits 'discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives,'" 2010 WL 761287, at *6, and that mass-monitoring stations "are the proper monitoring locations to determine if the MS4 is contributing to exceedances [of the Water Quality Standards or water quality objectives,]" *id.*, the district court held that Plaintiffs were attempting to establish liability without presenting evidence of who was responsible for the stormwater discharge. The district court observed that although "the District is responsible for the pollutants in the MS4" at the time they pass the mass-emissions stations, "that does not necessarily determine the question of whether the water passing by these points is a 'discharge' within the meaning of the Permit and the

Clean Water Act." *Id.* at *7. Unable to decipher from the record where the MS4 ended and the Watershed Rivers begin, or whether any upstream outflows were contributing stormwater to the MS4, the district court stated that "Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged though [sic] at least one District outlet." *Id.* at *8.

Following supplemental briefing, the district court again determined that "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." The district court thereupon entered summary judgment for Defendants on all four Watershed Claims.

Under Fed. R. Civ. P. 54(b), the district court entered a partial final judgment on the Watershed Claims because they were "factually and legally severable" from the other claims and "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Plaintiffs timely appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's grant of summary judgment in a Clean Water Act enforcement action de novo. *Assoc. to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1009 (9th Cir. 2002) (citing *Waste Action Project v. Dawn Mining Corp.*, 137 F.3d 1426, 1428 (9th Cir. 1998)).

DISCUSSION

Determining whether the County or the District violated the Permit's conditions, and thereby the Clean Water Act, requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances.

I. Whether Exceedances at Mass-Emission Stations Constitute Permit Violations

"The Clean Water Act regulates the discharge of pollutants into navigable waters, prohibiting their discharge unless certain statutory exceptions apply." *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1138 (9th Cir. 1998) (citing 33 U.S.C. § 1311(a)). One such exception is for discharges by entities or individuals who hold NPDES permits. *Id.* The NPDES permitting program is the "centerpiece" of the Clean Water Act and the primary

method for enforcing the effluent and water-quality standards established by the EPA and state governments. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997); *see also Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986-90 (9th Cir. 1995) ("Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the underlying purpose of the statute as a whole."); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156,175-76 (D.C. Cir. 1982) ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.")).

To decipher the meaning and enforceability of NPDES permit terms, we interpret the unambiguous language contained in the permit. *Russian River*, 142 F.3d at 1141. We review a permit's provisions and meaning as we would any contract or legal document. *See Nw. Envtl. Advocates*, 56 F.3d at 982. As described *supra*, the Permit prohibits MS4 discharges into receiving waters that exceed the Water Quality Standards established in the Basin Plan and elsewhere. Specifically, Section 2.1 provides: "[D]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Section 2.2 of the Permit reads: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible

for, shall not cause or contribute to a condition of nuisance."

Nevertheless, Defendants contend that exceedances observed at mass-emissions stations cannot establish liability on behalf of any individual Permittee. Their argument in this respect, as we discuss more thoroughly *infra*, relies heavily on their belief that the record is bereft of evidence connecting Defendants to the water-quality exceedances. Defendants also assert that the mass-emissions stations are "neither designed nor intended" to measure the compliance of any Permittee and, therefore, cannot form the basis for a Permit violation. Defendants also argue that municipal compliance with an NPDES stormwater permit cannot be reviewed under the same regulatory framework as a private entity or individual. In support of this contention, Defendants cite to a 1990 EPA rule:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits." Often, an end-of-the-pipe

> treatment technology is not appropriate for this type of discharge.

Brief of Appellees 33 (quoting "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges," 55 Fed. Reg. 47,990, 48,037-38 (Nov. 16, 1990)).

As we detail *infra,* neither the statutory development of the Clean Water Act nor the plain language of EPA regulations supports Defendants' arguments that NPDES permit violations are less enforceable or unenforceable in the municipal-stormwater context. In fact, since the inception of the NPDES, Congress has expanded NPDES permitting to bring municipal dischargers within the Clean Water Act's coverage.

A. Regulating MS4 Operators

The NPDES permitting program originated in the 1972 amendments to the Clean Water Act. Pub. L. 92-500, § 2, 86 Stat. 88, *reprinted in* 1972 U.S.C.C.A.N. 3668 (codified as amended at 33 U.S.C. § 1342). At the time, the NPDES program was viewed "as the primary means of enforcing the Act's effluent limitations." *Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1371 (D.C. Cir. 1977); *see also Natural Res. Def. Council, Inc. v. EPA,* 966 F.2d 1292, 1295 (9th Cir. 1992) (examining statutory history of 1972 amendments to the Clean Water Act) (hereafter *NRDC v. EPA*). The permitting program is codified at Section 402 of the Clean Water Act. 33 U.S.C. § 1342. In 1973, the EPA promulgated regulations categorically

exempting "discharges from a number of classes of point sources . . . including . . . separate storm sewers containing only storm runoff uncontaminated by any industrial or commercial activity." *Costle*, 568 F.2d at 1372 (citing 40 C.F.R. § 125.4 (1975)). The EPA's exemption of certain point sources, including ms4s, from Section 402's blanket requirement was invalidated by the United States Court of Appeals for the District of Columbia Circuit in *Costle*. *Id.* at 1376-77. The *Costle* court highlighted that "[t]he wording of the [CWA], legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402." *Id.* at 1377.

In the ten-year period following the *Costle* decision, the EPA did not promulgate regulations addressing discharges by ms4 operators. *See NRDC v. EPA*, 966 F.2d at 1296 (citing "National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines," 56 Fed. Reg. 56,548 (1991)). In 1987, after continued nonfeasance by the EPA, Congress enacted the Water Quality Act amendments to the Clean Water Act to regulate stormwater discharges from, *inter alia*, ms4s. *See Defenders of Wildlife*, 191 F.3d at 1163 ("Ultimately, in 1987, Congress enacted the Water Quality Act amendments to the CWA."); *NRDC v. EPA*, 966 F.2d at 1296 ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]")

(internal citations omitted); *see also* 55 Fed. Reg. 47,994 ("[P]ermits for discharges from municipal separate storm sewer systems must require controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary water quality-based controls, and must include a requirement to effectively prohibit non-storm water discharges into the storm sewers. Furthermore, EPA in consultation with State and local officials must develop a comprehensive program to designate and regulate other storm water discharges to protect water quality.").

The principal effect of the 1987 amendments was to expand the coverage of Section 402's permitting requirements. *NRDC v. EPA*, 966 F.2d at 1296. Section 402(p) established a "phased and tiered approach" for NPDES permitting. *Nw. Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176, 1193 (9th Cir. 2010) (citing 33 U.S. § 1342(p)(2)). "The purpose of this approach was to allow EPA and the states to focus their attention on the most serious problems first." *NRDC v. EPA*, 966 F.2d at 1296. "Phase I" included "five categories of stormwater discharges," deemed "the most significant sources of stormwater pollution," who were required to obtain an NPDES permit for their stormwater discharge by 1990. *Brown*, 617 F.3d at 1193 (citing 33 U.S. § 1342(p)(2)). The five categories of the most serious discharge were:

> (p) Municipal and industrial stormwater discharges . . .

(2) . . .

. . .

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) *A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.*

(D) *A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.*

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

33 U.S.C. § 1342(p)(2) (emphases added). Of the five categories of Phase I dischargers required to obtain the first permits, two are ms4 operators: municipalities with populations over 250,000, and municipalities with populations between 100,000 and 250,000. *Id.* § 1342(p)(2)(C)-(D). Indeed, as noted *supra*, the Permit at issue here was first authorized in 1990 pursuant to the 1987 amendments.

Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare"),[6] and as regulations prior to 1987 theoretically required, Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program. *Brown*, 617 F.3d at 1193. That assumption of municipal control is found in the Permit at issue here – Part 3.G.2 of the Permit states that "Permittees shall posses [sic] adequate legal authority to . . . [r]equire persons within their jurisdiction to comply with conditions in Permittee's ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows.)[.]"

Defendants' position that they are subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges cannot be reconciled with the significant legislative history showing Congress's intent to bring ms4 operators under the NPDES-permitting system. Even the selectively excerpted regulatory language Defendants present to us – "Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers

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[6] See 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[The regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

. . . [and] intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits" – does not support Defendants' view. Indeed, this excerpt is but one paragraph from a longer section titled, "Site-Specific Storm Water Quality Management Programs for Municipal Systems." 55 Fed. Reg. 48,037-38. The quoted language follows a paragraph which reads:

> Section 402(p)(3)(iii) of the CWA mandates that permits for discharges from municipal separate storm sewers *shall require controls to reduce the discharge of pollutants* to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Director determines appropriate for the control of such pollutants.

55 Fed. Reg. 48,038 (emphasis added). The use of such language – employing "mandates" and commands to regulate – hardly supports Defendants' notion that NPDES permits are unenforceable against municipalities for their stormwater discharges. Moreover, the paragraphs that follow the excerpt explain why developing system-wide controls to manage municipal stormwater is preferable to controlling pollution through end-of-pipe effluent technologies. *Id.* The regulations highlight that "Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner to allow site-specific permit conditions to reflect

the wide range of impacts that can be associated with these discharges." *Id.* Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why *water-quality standards* may be preferable over more-difficult-to-enforce effluent limitations. Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

B. Enforcement of Mass-Emissions Violations

Part and parcel with Defendants' argument that they are subject to a relaxed regulatory structure is their view that the Permit's language indicates that mass-emissions monitoring is not intended to be enforced against municipal dischargers. Defendants claim that measuring water-quality serves only an hortatory purpose – as Defendants state, "the mass emission monitoring program . . . neither measures nor was designed to measure any individual permittee's compliance with the Permit." This proposition, which if accepted would emasculate the Permit, is unsupported by either our case law or the plain language of the Permit conditions.

"The plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions." *Nw. Envtl.*

Advocates, 56 F.3d at 986 (emphasis in original). We used these words, and emphasized "*all*" permit conditions, because the language of the Clean Water Act is clear in its intent to guard against all sources and superintendents of water pollution and "clearly contemplates citizen suits to enforce 'a permit or condition thereof.'" *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("In other words, the statute takes the water's point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.").

We have previously addressed, and rejected, municipal attempts to avoid NPDES permit enforcement. In *Northwest Environmental Advocates*, we considered a citizen-suit challenging the City of Portland's operation of a combined sewer system which periodically overflowed and discharged raw sewage into two rivers. 56 F.3d at 981-82. The plaintiffs brought suit on the basis of an NPDES permit condition which "prohibit[ed] any discharges that would violate Oregon water quality standards." *Id.* at 985. Reviewing the history of the 1972 amendments and the Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994), we recognized that Congress had authorized enforcement of state water-quality standards, lest municipalities be immunized on the technicality that not all water standards can be expressed as effluent limitations. *Id.* at 988-89. The overflows from the Portland sewer system were

"caused primarily by uncontrollable events – *i.e.*, the amount of stormwater entering the system[.]" *Id.* at 989. Because the total amount of water entering and leaving the sewer system was unknown, it was impossible to articulate effluent standards which would "ensure that the gross amount of pollution discharged [would] not violate water quality standards." *Id.* Only by enforcing the water-quality standards *themselves* as the limits could the purpose of the CWA and the NPDES system be effectuated. *Id.* at 988-90. Indeed, we noted that prior to the 1972 incorporation of effluent limitations, the Clean Water Act depended entirely on enforcement *based on water-quality standards*. *Id.* at 986. However, troubled by the "'almost total lack of enforcement'" under the old system, Congress added the effluent limitation standards "not to supplant the old system" but to "improve enforcement." *Id.* at 986 (quoting S. Rep. No. 414, 92d Cong., 2d Sess. 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Moreover, the plain language of the Permit countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms, including mass-emissions monitoring. First, the Permit incorporates and adopts the Basin Plan, which sets the water-quality standards for bacteria and contaminants for the receiving waters of Southern California, including the Watershed Rivers. The Permit then sets out a multi-part monitoring program for those standards, the goals of which explicitly include "[a]ssessing compliance with

this Order[.]" "Compliance" under the Clean Water Act primarily means adhering to the terms and conditions of an NPDES permit. *EPA v. Calif.*, 426 U.S. at 223 ("Thus, the principal means of enforcing the pollution control and abatement provisions of the Amendments is to enforce compliance with a permit."). The first monitoring program listed in the Permit is "Mass Emissions." While Defendants are correct in noting that mass-emissions monitoring has as one of its goals "estimat[ing] the mass emissions from the MS4," Defendants fail to mention that another goal, listed just below "estimating," is "[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards."

Part 6.D of the Permit, titled "Duty to Comply," lays any doubts about municipal compliance to rest: "Each Permittee *must comply with all terms,* requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act . . . *and is grounds for enforcement action,* Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof[.]" This unequivocal language is unsurprising given that all NPDES permits must include monitoring provisions ensuring that permit conditions are satisfied. *See* 33 U.S.C. § 1318(a)(A) ("[T]he Administrator [of the EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological

monitoring methods), [and] (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe)[.]"); 40 C.F.R. § 122.44(i)(1) (specifying the monitoring requirements for compliance, "mass . . . for each pollutant limited in the permit," and volume of effluent discharged); *Ackels v. EPA*, 7 F.3d 862, 866 (9th Cir. 1993) ("[T]he Act grants EPA broad authority to require NPDES permitees [sic] to monitor, at such intervals as the Administrator shall prescribe, whenever it is required to carry out the objectives of the Act.").

Our prior case law emphasizes that NPDES permit enforcement is not scattershot – each permit term is simply enforced as written. *See Union Oil*, 813 F.2d at 1491 ("It is unclear whether the court intended to excuse these violations under the upset defense or under a de minimis theory. In either event, the district court erred. The Clean Water Act and the regulations promulgated under it make no provision for 'rare' violations."); *see also United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (D. Ark. 1991) ("For enforcement purposes, a permittee's [Discharge Monitoring Reports] constitute admissions regarding the levels of effluents that the permittee has discharged."). As we explained in *Union Oil*, Congress structured the CWA to function by self-monitoring and self-reporting of violations to "'avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement.'" 813 F.2d at 1492 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64, *reprinted*

in 1972 U.S.C.C.A.N. 3668, 3730). When self-reported exceedances of an NPDES permit occur, the Clean Water Act allows citizens to bring suit to enforce the terms of the Permit.

In sum, the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance and that "[a]ny violation of this Order" is a Clean Water Act violation. The Permit is available for public inspection to aid this purpose. Accordingly, we agree with the district court's determination that an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers.

II. Evidence of Discharge

We next turn to the factual issue on which the district court granted summary judgement in favor of Defendants – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations. The district court determined that a factual basis was lacking:

> Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows. . . .

> However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream).
>
> . . .
>
> In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through Defendants' MS4 *outflows* at or near the time the exceedances were observed." That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit.

Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act (which means in compliance with the NPDES). *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe,* 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the

Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives *are prohibited.*"

"[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, *inter alia,* "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2. The Watershed Rivers are all navigable waters.

Thus, the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers. Defendants contend that the "District does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Moreover, Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers. In the words of the district court, there is no evidence that "standards-exceeding pollutants . . . passed through

Defendants' MS4 *outflows* at or near the time the exceedances were observed." Plaintiffs counter that the monitoring stations are downstream from hundreds of miles of storm drains which have generated the pollutants being detected. To Plaintiffs, it is irrelevant which of the thousands of storm drains were the source of polluted stormwater – as holders of the Permit, Defendants bear responsibility for the detected exceedances.

Resolving this dispute over whether Defendants added pollutants depends heavily on the level of generality at which the facts are viewed. At the broadest level, all sides agree with basic hydrology – upland water becomes polluted as it runs over urbanized land and begins a downhill flow, first through municipal storm drains, then into the MS4 which carries the water (and everything in it) to the Watershed Rivers, which flow into the Pacific Ocean. More narrowly, it is, as Plaintiffs concede, impossible to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation. Ultimately, each side fails to rebut the other's arguments. Defendants ignore their role as controllers of thousands of miles of MS4 and the stormwater it conveys[7] by demanding that

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[7] Defendants' untenable position about their responsibility for discharges is confirmed by the testimony of their Rule 30(b)(6) witness:

> *Question*: What if those flows [which exceeded water-quality standards] were so polluted with oil and grease

(Continued on following page)

Plaintiffs engage in the Sisyphean task of testing *particular* storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.

Despite shortcomings in each side's arguments, there is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a naturally

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that they *were on fire as they came out of the system*? Would your view be the same, that the District is not contributing to exceedances?

Answer: That the system the District maintains is not contributing to, yes.

occurring Watershed River. *See Headwaters,* 243 F.3d at 533 ("The EPA has interpreted 'waters of the United States' to include 'intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce' and 'tributaries of [those] waters.'" (quoting 40 C.F.R. § 122.2(c), (e)). At least some outfalls for the MS4 were downstream from the mass-emissions stations. *See* 40 C.F.R. § 122.26(9) ("Outfall means a point source . . . at the point where a municipal separate storm sewer discharges to waters of the United States. . . ."). The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Although the District argues that merely channeling pollutants created by other municipalities or industrial NPDES permittees should not create liability because the District is not an instrument of "addition" or "generation,"[8] the Clean Water Act does

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[8] This issue does not usually arise in Clean Water Act litigation because it is generally assumed that ms4s "discharge" stormwater. *See, e.g., Miss. River Revival v. Adm'r, E.P.A.*, 107 F. Supp. 2d 1008, 1009 (D. Minn. 2000) ("These lawsuits involve

(Continued on following page)

not distinguish between those who add and those who convey what is added by others – the Act is indifferent to the originator of water pollution. As Judge Wilkinson of the Fourth Circuit cogently framed it: "[The Act] bans 'the discharge of any pollutant by any person' regardless of whether that 'person' was the root cause or merely *the current superintendent of the discharge.*" *Huffman,* 625 F.3d at 167 (emphasis added). "Point sources" include instruments that channel water, such as "any pipe, ditch, *channel,* tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). The EPA's regulations further specify that ms4 operators require permits for channeling: "Discharge of a pollutant . . . includes additions of pollutants into waters of the United States from: surface runoff which is collected or *channelled* by man; discharges through pipes, sewers, or other conveyances owned by a State [or] municipality." 40 C.F.R. § 122.2 (emphasis added). "[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program." 55 Fed. Reg. 47,991. Finally, the Supreme

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the discharge of storm water into the Mississippi River through the Cities' storm sewers. Thus, and this is not in dispute, the storm water discharge is subject to the NPDES permitting requirements.").

Court stated in *Miccosukee Tribe* that "the definition of 'discharge of a pollutant' contained in § 1362(12) . . . *includes* within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105 (emphasis added).

Accordingly, the district court erred in stating that "Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations." In light of the evidence that the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit. Thus, Plaintiffs are entitled to summary judgment on Claims 2 and 3.

However, we agree with the district court that, as the record is currently constituted, it is not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek (Claims 1 and 4). Like the district court, we are unable to identify the relationship between the MS4 and these mass-emissions stations. From the record, it appears that both monitoring stations are located within the rivers themselves. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the inter-workings or connections of this complicated drainage system. We recognize that both the

Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm drains and MS4 channels. It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass-emissions stations. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 "contributed" to a water-quality exceedance detected at the Monitoring Stations. *See, e.g., Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 846-47 (5th Cir. 1983) ("We wish to emphasize most strongly that it is foolhardy for counsel to rely on a court to find disputed issues of material fact not highlighted by counsel's paperwork; a party that has suffered the consequences of summary judgment below has a definite and specific duty to point out the thwarting facts. . . . Judges are not ferrets!"). Contrary to Plaintiffs' contention, this would not require independent sampling of the District's outfalls. Indeed, simply ruling out the other contributors of stormwater to these two rivers or following up to vague answers given by Defendants' witnesses could have satisfied Plaintiffs' evidentiary obligation. In the alternative, prior to commencing actions like this one, Plaintiffs could heed the district court's sensible observation and, for purposes of their evidentiary burden, "sample from *at least one* outflow that included a standards-exceeding pollutant[.]"

Finally, for all four Watershed Rivers, the record is silent regarding the path stormwater takes from the unincorporated land controlled by the County to the Monitoring Stations. The district court correctly demanded evidence for the County's liability, which Plaintiffs did not proffer.

In sum, Plaintiffs were entitled to summary judgment on Claims 2 and 3 against the District for the Los Angeles River and San Gabriel River because (1) the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by the District, (2) these Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit, and (3) this polluted water "discharged" into the Los Angeles River and San Gabriel River. The Plaintiffs, however, have not met their burden on summary judgment for their other claims because they did not provide the district court with evidence that the MS4 controlled by the District "discharged" pollutants that passed through the Monitoring Stations in the Santa Clara River and Malibu Creek, or that ms4s controlled by the County "discharged" pollutants that passed through the Monitoring Stations in any of the four rivers in question.

CONCLUSION

The district court's judgment for Defendant District on Claims 2 and 3 of the First Amended Complaint is REVERSED, and this matter is REMANDED to the district court for further proceedings

consistent with this opinion. The district court's grant of summary judgment for Defendant District on Claims 1 and 4, and for Defendant County on all Watershed Claims, is AFFIRMED.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1467 AHM (PLAx) Date April 26, 2010

Title NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.* v. COUNTY OF LOS ANGELES, *et al.*

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS
(No Proceedings Held)

On March 2, 2010, the Court issued a ruling on the parties' cross motions for summary judgment, disposing of most of the claims. The Court reserved ruling on the "Watershed Claims." The Court found that the Plaintiffs had presented no evidence that *discharges* (meaning outflow from a point source) from the County or District portions of the MS4 were causing or contributing to pollutant exceedances at the mass emissions stations downstream. The Court ordered the parties to file simultaneous supplementary briefing on these claims. Specifically, the Court ordered that they:

> specify whether there is any basis in the record or in other facts currently in their possession establishing that the standards exceeding pollutants identified at page 4 passed through the Defendants' MS4 outflows at or near the time the exceedances were observed. In addition, both sides must disclose whether any facts in the record or already in their possession support a finding that Water Quality Standards were exceeded at the monitoring stations in Santa Clara River and Malibu Creek. Each side's response to these inquiries must not exceed five pages and must be filed by March 10, 2010. No response to the other side's filing will be permitted.

March 2, 2010 Order at 13-14. Having reviewed the parties' submissions, the Court GRANTS summary adjudication to the Defendants on the watershed claims – claims one through three and the Malibu Creek portion of claim four.

A. Motion to Strike Plaintiffs' Supporting Declarations

As a threshold matter, Defendants have moved to strike the supporting declarations that Plaintiffs have filed with their supplemental brief. The Court DENIES that motion. The declarations Plaintiffs filed do not cause Plaintiffs to have exceeded the page limit. The documents on which Plaintiffs rely are either publicly available (and have been so since

before March 2, 2010) or were identified by either Plaintiffs or Defendants during discovery.

B. The Merits

Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow. Plaintiffs do represent in their supplemental briefing that their monitoring data reflects sampling conducted at or near Defendants' outflows. *See, e.g.*, Plaintiffs' Brief at 2 ("The concentration of these pollutants in discharges measured directly from defendants' outfalls[1] exceeds corresponding water quality standards."). However, the declarations on which Plaintiffs rely do *not* clearly indicate that the sampling in question was conducted at an outflow (as opposed to in-stream). *See, e.g.*, Fernandez Decl. ¶¶ 16-20 (authenticating exhibits M-P on which Plaintiffs rely, but never specifying whether any of the monitoring stations were at an MS4 *outlet*[2]); the Burdick and Alamillo Declarations similarly do not specify that the monitoring data was collected at or

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[1] Plaintiffs use the term "outfalls" synonymously with "outflows" in their supplemental brief.

[2] "Drain" is not synonymous with "outlet," since storm drain refers to the conduit that carries the water, and a measurement taken in a drain may or may not be near an outlet.

near a Defendant's *outflow* (as opposed to simply in a watercourse or drain). Indeed, at least some of the monitoring data on which Plaintiffs rely as establishing a discharge from Defendants' outflows was not collected at an outflow. *See* Fernandez Decl., Ex. K at 83-84 (describing monitoring sites 1-6 as "open" channels, a "streambed," or a "scour pond," none of which would qualify as an outflow); Plaintiffs' Brief at 2 (citing to Ex. K to support the proposition that pollutants have been "discharged [to Malibu Creek] in excess of corresponding water quality standards *directly from defendants' outfalls*" (emphasis added)).[3]

In short, Plaintiffs have failed to follow the Court's instructions and present data which could establish that "standards-exceeding pollutants . . . passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed." March 2 Order at 13 (emphasis added). That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit. A co-permittee, including the County and the District, is responsible "only for a *discharge* for which it is the

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[3] Ex. L to the Fernandez Decl. at 104 does suggest that the monitoring for that report was conducted at outflows. However, this reference is buried within the report – not cited in the declaration or the supplemental briefing – and for most of the exhibits, the site descriptions are not even available in the selected pages included in the filed materials.

operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("*Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator."). The Clean Water Act, in turn, defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, . . . [or other examples], from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Thus, the monitoring data must be from at or near a "discernible, *confined*, and discrete conveyance," *id.* (emphasis added), in order to form the basis for a finding that the County or District had discharged in violation of the Permit.

Because Plaintiffs have failed to establish a basis for the Court to find that standards-exceeding pollutants passed through County or District outflows upstream of the mass emissions stations at or near the time that exceedances were observed downstream, the Court GRANTS summary judgment to the Defendants on the watershed claims.[4]

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[4] Docket No. 113.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 08-1467 AHM (PLAx) Date March 2, 2010

Title NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.* v. COUNTY OF LOS ANGELES, *et al.*

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter/ Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs:	Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS
(No Proceedings Held)

I. INTRODUCTION

On March 3, 2008, Plaintiffs Natural Resources Defense Council ("NRDC") and Santa Monica Baykeeper filed suit against Defendants the County of Los Angeles ("County"), the Los Angeles Flood Control District ("District"), and the individual County Supervisors and the Director of the Los Angeles County Department of Public Works in their official capacities, alleging that the County and the District violated several provisions in the National Pollutant Discharge Elimination System ("NPDES") Permit regulating municipal stormwater and urban runoff

discharges within the County of Los Angeles (the "Permit"). In its June 20, 2008 Order, the Court denied Defendants' motion to stay the case and granted in part and denied in part Defendants' motion to dismiss, finding that Plaintiffs had failed to provide adequate notice to the District but allowing Plaintiffs to refile against the District after valid notice. On September 19, 2008, Plaintiffs filed their First Amended Complaint ("FAC").

The FAC alleges six causes of action under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, for: (1) causing and contributing to exceedances of water quality standards in the Santa Clara River watershed; (2) causing and contributing to exceedances of water quality standards in the Los Angeles River watershed; (3) causing and contributing to exceedances of water quality standards in the San Gabriel River watershed; (4) causing and contributing to exceedances of water quality standards and Total Maximum Daily Load ("TMDL") violations in the Malibu Creek watershed and at Surfrider Beach; (5) illegally discharging waste into the oceanic Area of Special Biological Significance ("ASBS") between Mugu Lagoon in Ventura County and Latigo Point in Los Angeles County; and (6) failing to submit adequate Receiving Water Limitations ("RWL") Compliance Reports.

On September 8, 2009, Plaintiffs moved for partial summary judgment as to liability as to claims two and three (as to the District); as to the Surfrider Beach violations in claim four; and as to all of claims five and six. On September 14, 2009, Defendants filed

their motion for summary judgment as to all counts. Plaintiffs have also filed a Motion for Leave to File Surreply in Opposition to Defendants' Motion for Summary Judgment, which the Court DENIES.[1] The Court held a hearing on the summary judgment motions on February 8, 2010. For the following reasons, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs' motion.[2] The Court also GRANTS IN PART AND DENIES TN PART Defendants' motion.[3]

Specifically, the Court DENIES summary judgment for both parties as to the watershed claims (claims one, two, three, and the Malibu Creek portion of claim four). The Court GRANTS summary judgment for the Plaintiffs on claim five and on the Surfrider Beach portion of claim four.[4] The Court

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[1] Docket No. 173.

[2] Docket No. 87.

[3] Docket No. 113.

[4] The parties have notified the Court that Judge Yaffe of the Superior Court for the County of Los Angeles has stayed the operation of Los Angeles Regional Water Quality Control Board Order No. R4-2006-0074 (the "Regional Board Order"). Defendants' Notice of Los Angeles Superior Court Order, Ex. 1. This Regional Board Order amended the Permit to establish the TMDL limits at Surfrider Beach. Plaintiffs' Response to Defendants' Notice of Los Angeles Superior Court Order at 1. With this Regional Board Order stayed, the TMDL limits at Surfrider Beach at issue in claim four are not currently operational. The state court stay does not affect the Court's analysis as to liability on claim four. However, the state court proceeding may affect the remedies stage of this case. In addition, should Judge Yaffe invalidate the Regional Board Order, Defendants may move to vacate the judgment on this claim.

GRANTS summary judgment for the Defendants on all portions of claim six except for the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach. The Court DENIES summary judgment for both parties as to the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach.

II. SUMMARY OF UNDISPUTED FACTS

The municipal separate storm sewer system ("MS4") in the Los Angeles County basin carries urban runoff from local storm drains to inland rivers and eventually to ocean waters. Plaintiffs' SUF ¶ 3. No treatment plant cleans the runoff before it enters the so-called receiving waters of the region, so the runoff can contain a number of untreated pollutants it acquires as it flows over streets, parking lots, commercial sites, and residential areas. Plaintiffs' SUF ¶ 2. The MS4 is a complicated web, with thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections. Plaintiffs' SUF ¶¶ 4-5. The MS4 includes storm drains operated by – and runoff coming from-84 incorporated cities, in addition to that from the County and District. Defendants' SUF ¶ 8. The District owns, operates, and maintains approximately 500 miles of open channel and 2,800 miles of storm drains, which is more of the MS4 than all 84 co-permittee cities combined. Plaintiffs' SUF ¶ 20-21. The County owns and operates additional storm drains, separate from the District, that connect to the MS4. *Id.* at ¶ 22. The

County has no central record of these storm drains and does not know their complete extent. *Id.*

The Regional Water Quality Control Board ("Regional Board"), an entity of the State of California, issued collectively to the County, the District, and these 84 cities a National Pollutant Discharge Elimination System ("NPDES") Permit required under the Clean Water Act. This Permit allows the Permittees to discharge stormwater runoff from the MS4, contingent on meeting a number of conditions. Defendants' SUF ¶ 7-9. Most notably, Part 2.1 of the Permit provides that "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Defendants' SUF ¶ 12. The Permit incorporates water quality standards from the Los Angeles Region Basin Plain for the Coastal Watersheds of Los Angeles and Ventura Counties ("Basin Plan") and the California Ocean Plan ("Ocean Plan"). *See* Cal. Water Code §§ 13170.2 & 13240.

The Permit sets forth a monitoring program, which includes a requirement for the Principal Permittee (the District) to monitor the runoff flowing past seven specific mass emissions stations. Plaintiffs' SUF ¶¶ 23-24; Defendants' SUF ¶ 10. These mass emissions stations include the Malibu Creek, Los Angeles River, San Gabriel River, and Santa Clara River monitoring stations at issue in this case. The Los Angeles River and San Gabriel River mass emissions monitoring stations are located within the portion of the MS4 owned and operated by the Flood

Control District. Plaintiffs' SUF ¶ 24. Monitoring data from the Los Angeles River and San Gabriel River mass emissions stations indicate that water quality standards have repeatedly been exceeded for a number of pollutants, including aluminum, copper, cyanide, fecal coliform bacteria, and zinc (the "standards-exceeding pollutants").[5] Plaintiffs' SUF ¶¶ 33-37.

The Permit's monitoring program also includes a requirement that water quality samples be taken five times per week at Surfrider Beach, a beach within the Santa Monica Bay. Plaintiffs' SUF ¶ 25. This monitoring shows that the water at Surfrider Beach has exceeded bacterial limits (including limits on total coliform, fecal coliform, and enterococcus) on dozens of occasions during summer dry weather seasons. Plaintiffs' SUF ¶¶ 25-28. The Regional Board has issued Notices of Violation to the County and the District (and the 84 cities that discharge to the MS4) indicating that discharges from the MS4 are causing or contributing to bacterial exceedances at Surfrider Beach. Colangelo Decl. Exs. G & H.

The California Ocean Plan prohibits the discharge of waste into the Malibu Area of Special Biological Significance ("ASBS"), which covers the 4-mile coastline from Latigo Point in Malibu to Laguna Point in Ventura. Plaintiffs' SUF ¶¶ 17, 42. Plaintiffs

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[5] Neither party has provided the Court with monitoring data from the other mass emissions monitoring stations.

assert that this prohibition has been incorporated into the Permit. The District and the County own and operate drains (at least 13 District drains and 8 County drains) that discharge to the Malibu ASBS. Plaintiffs' SUF 45. County sampling of 11 of these drains in 2004 indicated that every single wet-weather event (rainstorm) sampled had discharges exceeding bacteria limits. Plaintiffs' SUF ¶ 46. Sampling data collected by Santa Monica Baykeeper covering at least 2004-2006 show numerous instances of discharge from these drains exceeding applicable water quality standards. Plaintiffs' SUF ¶ 47.

The Permit also requires Permittees to submit to the Regional Board annual Receiving Water Limitations ("RWL") Compliance Reports describing the Permittee's plan to remedy violations of the permit "[u]pon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard." Defendants' SUF ¶¶ 13-14. Defendants did not submit any Compliance Reports in 2003, 2004, or 2005. Plaintiffs' SUF ¶ 53. Defendants submitted Compliance Reports in 2006, 2007, and 2008, but the parties disagree as to whether these Reports satisfied the requirements under the Permit. Plaintiffs' SUF ¶¶ 54-62.

III. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides for summary judgment when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The moving party bears the initial burden of demonstrating the absence of a "genuine issue of material fact for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). A fact is material if it could affect the outcome of the suit under the governing substantive law. *Id.* at 248. The burden then shifts to the nonmoving party to establish, beyond the pleadings, that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

"When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's

case. *See Celotex,* 477 U.S. at 325. Thus, "[s]ummary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 805-06 (1999) (citing *Celotex,* 477 U.S. at 322).

When the moving party meets its burden, the "opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e). Summary judgment will be entered against the opposing party if that party does not present such specific facts. *Id.* Only admissible evidence may be considered in deciding a motion for summary judgment. *Id.*; *Beyene v. Coleman Sec. Servs., Inc.,* 854 F.2d 1179, 1181 (9th Cir. 1988).

"[I]n ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Hunt v. Cromartie,* 526 U.S. 541, 552 (1999) (quoting *Anderson,* 477 U.S. at 255). But the non-moving party must come forward with more than "the mere existence of a scintilla of evidence." *Anderson,* 477 U.S. at 252. Thus, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted).

Simply because the facts are undisputed does not make summary judgment appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the undisputed facts, summary judgment is improper. *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985).

IV. ANALYSIS

A. Threshold Issues: Standing and Notice

1. Plaintiffs have standing to sue.

Plaintiffs NRDC and Santa Monica Baykeeper have demonstrated that they have associational standing in this suit.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

In order for Plaintiffs' members to have standing to sue on their own, they would have to show: (1) they have "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;

and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Plaintiffs' members use and enjoy the water bodies involved in this case for recreational and professional reasons, and their reasonable concern about exposure to pollutants has caused them to curtail their use of the Los Angeles River, San Gabriel River, Surfrider Beach, and the Malibu ASBS. Plaintiffs' SUF ¶¶ 68-70. The impairment of aesthetic, recreational, and professional interests is an injury in fact. *Laidlaw,* 504 U.S. at 184-85. Moreover, the Plaintiffs' members' injuries are caused in part by Defendants' MS4 discharges, and reducing those discharges would help to redress their injuries. Plaintiffs' SUF ¶ 71.

In addition, the lawsuit is germane to each Plaintiff's organizational purpose, as they are environmental organizations, and Santa Monica Baykeeper has a specific focus on protecting Santa Monica Bay. Plaintiffs' SUF ¶ 72. If, as here, associational plaintiffs do not seek individualized relief for their members that would require individualized proof, the participation of individual members is not required. *Hunt,* 432 U.S. at 343-44. Thus, Plaintiffs have standing to sue.

2. Plaintiffs have provided sufficient notice.

Defendants ask the Court to reconsider its decision in its June 20, 2008 Order in light of a recent

Ninth Circuit case addressing the notice requirement in CWA citizen suits and find that the Court has no jurisdiction to hear the claims against any defendant. *See Center for Biological Diversity v. Marina Point Development Co.*, 566 F.3d 794 (9th Cir. 2009); Motion at 10. *Marina Point Development* did not alter the standard for CWA notice in this Circuit; it merely reiterated the need for the notice to, at a minimum, tell a potential defendant "precisely what it allegedly did wrong, and when." *Id.* at 801.[6] Plaintiffs' notice to the Defendants here does precisely that. It lists with detailed specificity the exact portions of the permits and statutes allegedly violated and the exact date, location, and nature of each alleged violation. Colangelo Decl., Ex. RR at 570-83. The Court finds this notice adequate for the case to proceed against Defendants and will not reconsider the ruling in its June 20, 2008 Order.

B. Neither Plaintiffs Nor Defendants Are Entitled to Summary Judgment on the Watershed Claims Because Genuine Issues of Material Fact Remain.

The "Watershed Claims" encompass those claims that involve the rivers and creeks into which the MS4 flows (claims one through three and the Malibu Creek

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[6] The court cited, discussed, and did not reject, much less overrule, the case that this Court cited in its June 20, 2008 Order, *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002).

portion of claim four). With respect to these claims, Defendants do not dispute Plaintiffs' monitoring data.[7] Defendants argue, however, that because the monitoring stations are located downstream of where their own storm drains connect with the larger MS4, the discharges for which they are responsible will be commingled with those of other MS4 users. Defendants argue, therefore, that they cannot be found to be "causing or contributing" to the permit exceedances.[8]

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[7] Plaintiffs move for summary judgment only on the claims involving the Los Angeles River and San Gabriel River watersheds, and so the Court has been presented with data of permit exceedances only in these locations.

[8] As a preliminary matter, Defendants argue that in order for a permittee to be in violation of the permit, either the permittee or the Regional Board must have made a determination that the permittee is causing or contributing to exceedances of water quality standards, and the permittee must also fail to participate in good faith in the iterative process to remedy the exceedances. Opp'n at 17-19. A state court has already ruled on these arguments in Defendants' challenge to the validity of the Permit and found that, based on the regulatory history underlying the creation of the Permit, there is no safe harbor for a Permittee who complies with the iterative process. *In re Los Angeles County Municipal Storm Water Permit Litigation*, No. BS 080548, at 6-7 (Los Angeles Super. Ct. Mar. 24, 2005) (Colangelo Decl., Ex. D at 166-67). This Court agrees with that analysis. At the hearing, Defendants directed the Court's attention to a January 22, 2001 letter from the then-chair of the Regional Board, Francine Diamond, which the Superior Court cited in its opinion. *See* Gest Decl. Ex. D at 8-9. The Diamond letter suggests that as long as a Permittee is engaged in a good faith effort in the iterative process to remedy exceedances, it is in compliance with the Permit. However, as an informal mailing to Permittees, this letter does not have the force of law, and the

(Continued on following page)

The Permit clearly prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit, Burhenn Decl. Ex. 1, Part 2.1 at 23. The Permit designates the mass emissions monitoring stations as the locations where monitoring shall take place to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards. . . ." *Id.* at T-6. Because the permit specifies that these stations are the proper monitoring locations to determine if the MS4 is contributing to exceedances, Defendants' argument that these locations cannot be the basis for determining whether there were exceedances fails.

Defendants also assert that because the monitoring stations are located downstream of where their own storm drains join these water bodies, the monitoring data cannot possibly pinpoint that their discharges – as opposed to those of the other entities using the MS4 caused the exceedances.[9] However, in order for the Permit to be violated, it is not necessary

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Court need not defer to it, especially when it runs counter to the language of the Permit.

[9] At the hearing, Defendants cited to numerous portions of the Permit and witness depositions and declarations that demonstrate that there were other sources of the pollutants at issue here. This is undoubtedly true, but irrelevant to liability under the Permit. "[D]ischarges from the MS4 that cause *or contribute* to the violation of Water Quality Standard . . . are prohibited." Permit Part 2.1 at 23. The MS4 or a particular Permittee need not be the sole source of the pollutant to be in violation of the Permit.

to pinpoint the source of pollutants. The Permittees, collectively, are violating the permit if "discharges from the MS4" are "caus[ing] or contribut[ing] to the violation of Water Quality Standards or water quality objectives." Permit Part 2.1 at 23; *see also In re Los Angeles County Municipal Storm Water Permit Litigation,* No. BS 080548, at 6 (Los Angeles Super. Ct. Mar. 24, 2005) (Colangelo Decl., Ex. D at 166) (explaining that subparts 2.1 and 2.2 of the Permit set forth the "basic receiving water requirements for Los Angeles area waters" and acknowledging that a permittee could be in "violation" of these requirements).

According to the Permit, monitoring at the mass emissions stations shall be used to determine if the MS4 is causing or contributing to exceedances. Permit at T-6. Here, Plaintiffs have alleged that water quality standards were exceeded at the monitoring stations on each of the four rivers (Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek) on multiple occasions. FAC ¶¶ 79-229. Defendants have offered no facts to dispute these allegations. Moreover, Defendants have even acknowledged that their MS4 is conveying the specified pollutants to the water bodies in question. *See* Colangelo Decl., Ex. N at 291-93, 295, 298. Thus, Defendants are not entitled to judgment as a matter of law that they are in compliance with the Permit.

With respect to the Los Angeles River and San Gabriel River, Plaintiffs have moved for partial summary judgment as to liability for the District. Plaintiffs offer data showing the exceedances at the

monitoring stations for these bodies of water. Plaintiff's SUF ¶¶ 33-37. In addition, Plaintiffs argue that because the mass emissions monitoring stations for these bodies of water are located in the portion of the MS4 owned and operated by the District, the District is responsible for the pollutants in the MS4 at this point. *See* Plaintiffs' SUF ¶ 24. The Court agrees with this proposition. As a Permittee, the District is "required to comply with the requirements of this Order applicable to discharges within its boundaries. . . ." Permit Part 3.E at 26; *see also* Part 3.D.8 at 25 (explaining that as Principal Permittee, the District must comply with the requirements of general Permittees, as well). However, that does not necessarily determine the question of whether the water passing by these points is a "discharge" within the meaning of the Permit and the Clean Water Act.

Indeed, Defendants argue that the water sampled at these monitoring stations does not constitute a discharge from the MS4, but merely reflects water passing by the stations. Defendants insist that no liability can attach to the District because it is merely allowing water to move within the same waterbody and, thus, no discharge occurs at the monitoring stations. The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, . . . [or other examples], from which pollutants are or may be discharged." 33 U.S.C.

§ 1362(14). A point source can include objects "that do not themselves generate pollutants." *South Florida Water Management District v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004). In *Miccosukee,* the Supreme Court held that if two portions of a water body are part of the same water body, moving "water from one into the other cannot constitute an 'addition' of pollutants" so as to constitute a discharge under the Act. *Id.* at 109.[10] Plaintiffs have not provided the Court with the necessary evidence to establish that the Los Angeles River and the San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations. In other words, the record before the Court does not show where the MS4 ends and either River begins. In order for the District's actions to violate Part 2.1 of the Permit, it must be discharging pollutants from a point source. The Court has been presented with no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations.

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[10] At the hearing, Plaintiffs took issue with the Court's citation to *Miccosukee* since that case addressed whether a permit could be issued under the Clean Water Act, and a permit already regulates the MS4 here. However, the Court is not relying on *Miccosukee* to invalidate the Permit, but rather to clarify the meaning of the terms "discharge" and "point source" under the Clean Water Act, in order to help understand how those terms in the Permit should be interpreted.

Plaintiffs pointed out during their oral argument that the District releases runoff through outlets that are *upstream* of the mass emissions stations on the San Gabriel and Los Angeles Rivers. Ex. UU to Second Colangelo Decl. at 283:4-17 (Pestrella D. Tr.). Outflow from these upstream outlets would be considered discharges under the Permit and the Clean Water Act. However, there is no data showing that any of these upstream discharges by the District are causing or contributing to the violations of the Water Quality Standards.

At the hearing, Plaintiffs also argued that exceedances at the mass emissions stations establish a violation of the Permit as a matter of law. They cited to 40 C.F.R. § 122.26(d)(ii)(3)(D), which requires a stormwater permit application to include

> A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

Plaintiffs assert that this regulation means that MS4 sampling need not be conducted at a point of discharge, but instead may be conducted at a "representative" location elsewhere, and that such a representative location may be used to determine the MS4' s compliance with the Permit. *See* Permit at T-6 (stating that the monitoring from the mass emissions stations

shall be used to "determine if the MS4 is contributing to exceedances of Water Quality Standards").

Where Plaintiff's argument runs into trouble, however, is the fact that although the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the Permit or not, that data is not sufficient to enable the Court to determine that the District is responsible for "discharges from the MS4 that cause or contribute to the violation" of standards under Part 2.1 of the Permit, since a co-permittee is responsible "only for a *discharge* for which it is the operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("*Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator."). There is no evidence showing that *discharges* from the District portions of the MS4 are contributing to the exceedances at the mass emissions stations. Plaintiffs would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one District outlet.[11] They have not done so. Consequently, the Court cannot

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[11] "In support of their position, Plaintiffs invoke the specter of being forced to sample every single outflow in Los Angeles County, which would be impossible. This ruling would not require that result. It would require sampling from at least one outflow that included a standards-exceeding pollutant, in order to show that a discharge from a particular permittee is contributing to an exceedance downstream.

grant summary judgment for the Plaintiffs on any of the watershed claims.

In their Motion for Summary Judgment, Defendants do not assert that, as a factual matter, the runoff they are discharging from their MS4 outlets is devoid of the observed pollutants. They instead make the legal arguments that the Court has already rejected above – that the flow from their MS4 outlets does not constitute discharge, that the monitoring data cannot be used to establish Permit noncompliance, that the presence of other sources of the pollutants absolves them of responsibility, and that the Permit provides a "safe harbor" for Permittees that participate in the iterative process. If the Court had an evidentiary basis to find that the standards-exceeding pollutants did not pass through the Defendants' MS4 outflows at or near the time the exceedances were observed, then Defendants could be entitled to summary judgment on these claims. However, neither side has introduced evidence of whether the standards-exceeding pollutants passed through the Defendants' outflows.

The Court therefore ORDERS each side to specify whether there is any basis in the record or in other facts currently in their possession establishing that the standards-exceeding pollutants identified at page 4 passed through the Defendants' MS4 outflows at or near the time the exceedances were observed. In addition, both sides must disclose whether any facts in the record or already in their possession support a finding that Water Quality Standards were exceeded

at the monitoring stations in Santa Clara River and Malibu Creek. Each side's response to these inquiries must not exceed five pages and must be filed by March 10, 2010. No response to the other side's filing will be permitted.

C. Plaintiffs Are Entitled to Summary Judgment on the Surfrider Beach Claim.

The Permit prohibits discharges from the MS4 that cause or contribute to violations of bacterial limits during the dry summer months at beaches in the Santa Monica Bay, including at a designated monitoring location at Surfrider Beach. Permit at 17, 22 (Part 1.B), 24 n.4, 24 (Part 2.5), & Att. U-2. Defendants do not dispute that exceedances of bacterial limits at Surfrider Beach have occurred dozens of times in the summer months since 2006. Defendants also do not dispute that the Regional Board has expressly identified MS4 discharges as one of the sources of fecal bacteria at the beach, in Notices of Violations that it issued to the County and the Flood District in March 2008. Plaintiffs' SUF ¶¶ 26-28, 31-32.

Defendants make two arguments that they are not liable for the exceedances at Surfrider Beach. First, they argue that because there are many other potential sources of bacteria at Surfrider Beach, the exceedances cannot be attributed to them. However, the existence of other potential sources is irrelevant to determining whether there has been a violation

under the Permit. With respect to Surfrider Beach, the Permit specifies that all permittees are "jointly responsible for compliance" with the requirements prohibiting discharges that cause or contribute to bacterial exceedances. Permit at 22 n.3. Thus, Defendants are liable for the exceedances so long as they contributed to them.

Defendants next argue that there is no evidence that they contribute to the exceedances at Surfrider Beach, in part because none of their storm drains discharge directly to Surfrider Beach. Nowhere does the Permit require that a permitee [sic] discharge directly to a monitoring site to "cause or contribute" to exceedances in violation of the Permit. *See* Permit at 17, 22 (Part 1.B), 24 n.4, 24 (Part 2.5), & Att. U-2. Indeed, the shoreline monitoring at Surfrider Beach itself is dispositive evidence of Permit violations. Permit at 16-17 (¶ 36). The Permit specifies that if bacterial limits are exceeded at a compliance monitoring site, the Regional Board will issue an appropriate investigative order. Only if the Regional Board thereafter determines that a permittee is not responsible for the exceedances will the permittee be absolved of responsibility. Permit at 17-18 (¶¶ 37-38). Here, the Regional Board has issued Notices of Violation to the County and the District (and the other entities that discharge to the MS4) indicating that the discharges from the MS4 are causing or contributing to bacterial exceedances at Surfrider Beach. Colangelo Decl. Exs. G & H. As Defendants conceded at oral argument, the Regional Board has not yet made a finding that

discharges from the MS4 are not contributing to the documented bacterial violations at Surfrider Beach. *See* Plaintiff's SUF ¶ 29. Thus, until the Regional Board decides otherwise, the Defendants are jointly responsible (along with the other permitees [sic]) for the bacterial exceedances at Surfrider Beach. Consequently, summary judgment as to liability for the Plaintiffs on this claim is warranted.

D. Plaintiffs Are Entitled to Summary Judgment on Their Claim of Illegal Discharge into the ASBS.

Defendants make two arguments for why they should not be held liable for discharging waste into the protected coastal Malibu ASBS. First, they assert that the prohibition on waste discharge has not properly been incorporated into the Permit and so Plaintiffs cannot enforce it under the citizen suit provision of the Clean Water Act. Next, they argue that even if the prohibition is considered part of the Permit, Defendants cannot be held liable for its violation because they are awaiting the outcome of their application for an exemption from the prohibition from the State Water Resources Control Board ("State Board").

1. Incorporation of the ASBS discharge prohibition into the Permit

Contrary to Defendants' arguments, the prohibition on discharging waste into the ASBS is incorporated into the Permit. The Permit prohibits

"discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit at 23. The Permit defines "water quality standard" to include "water quality criteria contained in . . . the California Ocean Plan. . . ." Permit at 70. The California Ocean Plan ("Ocean Plan"), in turn, prohibits the discharge of waste (defined as "a discharger's total discharge, of whatever origin") into any ASBS. Colangelo Decl. Ex. C at 150, 154.

Defendants argue that this prohibition of discharge of waste is not a "water quality standard" because it is located in Part III of the Ocean Plan – the program of implementation – rather than in Part I or Part II – the beneficial uses and water quality criteria sections. However, the State Board found, in a precedential order issued before the current Permit was adopted, that the "Ocean Plan discharge is a water quality standard" that is enforceable in an NPDES Permit. *In re California Department of Transporation* [sic], Order WQ 2001-08 at 8-9 (Apr. 26, 2001) (Colangelo Decl. Ex. I at 243-44). Because this was a precedential order, the Regional Board was bound to follow it when issuing the Permit, and therefore, the prohibition on waste discharge in an ASBS is a water quality standard for purposes of the Permit. *See* State Board Order WR 96-01 at 17 n.11 (Jan. 18, 1996) (designating all water quality decisions and orders as precedential decisions) (Second Colangelo Decl. Ex. XX at 45); Cal. Gov. Code

§ 11425.60 (authorizing precedential decisions by state agencies).

Moreover, this decision by the State Board, that the Ocean Plan's prohibition on the discharge of waste is a water quality standard, is supported by the Clean Water Act's regulations. The regulations specify, "Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. § 131.3(i). Water quality criteria are, in turn, defined as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). The prohibition on the discharge of waste into an ASBS is a classic example of the type of narrative statement that would qualify as a water quality criterion under this definition. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700, 715 (1994) ("'[C]riteria' are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic pollutants in toxic amounts.'" (citation omitted)).

Based on this analysis, the Ocean Plan's prohibition on discharge into an ASBS is a water quality standard that is covered by the Permit's prohibition on "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." Permit at 23.

2. Defendants' exemption application

Defendants also argue that they need not comply with the prohibition on discharging waste in the ASBS because they have applied for an exception from that prohibition with the State Board and their application is still pending. Opp'n at 23-24. This Court has already ruled on this issue in its June 20, 2008 Order on Defendants' motion to dismiss. In that Order, the Court found that the "State Water Resources Control Board has explicitly stated that the provisions of the 'Ocean plan' remain fully enforceable while it reviews the administrative applications on which Defendants rely." Order at 2. Defendants' attempt to relitigate this issue is improper.

Moreover, the cases which Defendants rely upon are inapposite, as they involve situations where no permit had yet been issued to regulate the defendant's discharge, not a situation like this one, where a valid permit limits the defendants' discharge, but an application for an exception is pending. *See Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11th Cir. 1996); *Mississippi River Revival v. City of Minneapolis*, 319 F.3d 1013 (8th Cir. 2003). The Defendants will not be permitted to avoid responsibility for their conduct currently regulated under the Permit, simply because a discretionary exception application is still pending with the State Board.

E. Defendants Are Entitled to Summary Judgment as to Part of the Compliance Reports Claim.

Defendants assert that they are not required to submit Receiving Water Limitations ("RWL") Compliance Reports under the Permit until and unless the Permittee or the Regional Board determines that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard. The Court agrees. The Permit clearly states, "Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a [RWL Compliance Report] to the Regional Board. . . ." Permit Part 2.3.a, at 23. In order for a Permittee to be required to submit RWL Reports, either the Permittee or the Regional Board must determine that discharges from the MS4 are causing or contributing to exceedances of a Water Quality Standard.

At oral argument, Plaintiffs directed the Court's attention to another provision of the Permit, which states (with respect to the Principal Permittee – the District), "When *data indicate* that discharges are causing or contributing to exceedances of applicable Water Quality Standards . . . a RWL Compliance Report . . . shall be submitted with the subsequent Unified Annual Report." Permit ¶ I.C.6 at T-4 (emphasis added). Plaintiffs would have the Court read this language to find that anytime the monitoring

data at the mass emissions stations exceeds water quality limits, an RWL Report is automatically required. However, as the Court found in Part IV.B of this Order, discussing the Watershed claims, data showing exceedances at the mass emissions stations does not necessarily show that *discharges* from the MS4 are causing or contributing to those exceedances, because the Court has been presented with no evidence establishing that standards-exceeding pollutants are passing through an outflow of either Defendant. Thus, even though Plaintiffs have presented evidence of exceedances at the monitoring stations since 2003, Fernandez Decl., Exs. A-G, this monitoring data did not automatically invoke the RWL requirements. Because neither the Regional Board nor the Defendants has formally determined that the MS4 is causing or contributing to exceedances of water quality standards in the four watersheds, Defendants are not required to submit RWL reports with respect to these water bodies. Thus, the Court grants summary judgment to Defendants with respect to the claim of inadequate Compliance Reports for the rivers and creeks.

In contrast, the Regional Board has made a determination, and notified Defendants through formal Notices of Violation, that the MS4 is causing or contributing to exceedances of bacterial limits at Santa Monica Bay beaches, including Surfrider Beach. Colangelo Decl., Exs. G & H. These Notices of Violation were sent to Defendants on March 4, 2008, so

they were required to submit RWL Compliance Reports addressing the violations at Surfrider Beach beginning on this date. Defendants have each submitted one RWL Compliance Report since receiving a Notice of Violation – their 2008 Compliance Reports. Colangelo Decl. Exs. NN & 00. These Reports do address the bacterial exceedances in Santa Monica Bay, but there is a genuine issue of material fact as to whether their discussion of the proposed changes to the monitoring program is adequate to meet the requirements of the Permit. SGI ¶ 62. Thus, the Court cannot grant either Defendants or Plaintiffs summary judgment as to the adequacy of the 2008 Compliance Reports.

V. CONCLUSION

For the foregoing reasons, the Court DENIES summary adjudication for the Plaintiffs as to the Watershed Claims (claims one, two, three, and the Malibu Creek portion of claim four). The Court reserves its ruling on the Defendants' Motion for Summary Judgment on the Watershed Claims pending the receipt of the briefing requested in Part IV.B of this Order. The Court GRANTS summary adjudication for the Plaintiffs on claim five and on the Surfrider Beach portion of claim four. The Court GRANTS summary adjudication for the Defendants on all portions of claim six except for the adequacy of the 2008 Compliance Reports' treatment of Surfrider

Beach. The Court DENIES summary adjudication for both parties as to the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach.

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OPPOSITION BRIEF

RECORD

Supreme Court U.S.
FILED
DEC 1 . 20.
OFFICE OF THE CLERK

No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondents Natural Resources Defense Council and Santa Monica Baykeeper represent that each organization is a non-profit corporation with no shares or debt securities in the hands of the public and no parent, subsidiary, or affiliates that have issued any shares or debt securities to the public.

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INTRODUCTION

The Los Angeles County Flood Control District is regulated by a Clean Water Act permit that prohibits the discharge of polluted stormwater from its municipal separate storm sewer system (MS4) to the Los Angeles River and San Gabriel River. The District's self-monitoring revealed persistent violations of permit limits for more than a dozen pollutants in each river. Plaintiffs Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper sued to enforce the permit. The District fought to evade any liability, testifying that it could not be held accountable even if its discharges "were so polluted with oil and grease that they were on fire as they came out of the system."

The court of appeals held that the District was responsible for the documented permit violations based on undisputed evidence that the District added pollutants to each river from its storm sewer outfalls. This fact-bound liability determination hinged on the language of the District's permit – the provisions of which were previously upheld by the California state courts with jurisdiction over that determination – and on the uncontested evidence of the District's polluted discharges.

In its petition to this Court, the District does not dispute these dispositive facts. Instead, in an attempt to generate an issue meriting review, the District advances a reading of the court of appeals' decision that contradicts its plain language. The District first claims that the court of appeals wrongly concluded that man-made improvements to a river "alter" the river's status as a navigable water subject to the Clean

Water Act. But the court held otherwise: that the Los Angeles River and the San Gabriel River are navigable waters, without regard to the District's physical improvements to those waterways.

The District next claims that the court of appeals improperly found the District liable for simply transferring water "within" a single water body. Again, the court did not so hold. It ruled that the undisputed evidence established that the District added polluted stormwater from its storm sewer outfalls into the Los Angeles River and San Gabriel River.

The court's holding therefore does not conflict with any decisions of this Court. And although the Ninth Circuit's ruling is important locally, it does not establish any new rule of law or conflict with any existing rule of law. Nor will it have the national reach that the District suggests; the court's liability determination was expressly based on the terms of this polluter's permit and the factual evidence of its discharges to two rivers.

The Court should deny review.

STATEMENT OF THE CASE

I. Factual Background

Stormwater runoff is a major source of water pollution in southern California. ER 302.[1] Water that

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[1] In this opposition, ER, SER, and FER refer to the Excerpts of Record, Supplemental Excerpts of Record, and Further Excerpts

flows over industrial sites, parking lots, streets, and residential areas carries untreated pollutants through storm drains and into rivers and the ocean. App. 6, 106. The harm caused by this pollution is "comparable to, if not greater than, contamination from industrial and sewage sources." *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 840 (9th Cir. 2003).

The District operates an MS4 engineered to collect, channel, and discharge this stormwater runoff to inland rivers and the ocean. App. 8; 40 C.F.R. § 122.26(b)(8) (defining MS4). The District's MS4 consists of thousands of miles of gutters, drains, pipes, and outfalls, App. 8, ER 243, and it discharges dozens of pollutants that are picked up in stormwater, including fecal bacteria and toxic metals, App. 6, 17; ER 306-08. These pollutants are conveyed to rivers and to the ocean in enormous amounts every year, measured not in pounds but in tons. ER 337, 342. These discharges cause human illness, environmental harm, and an annual economic loss to the region of tens of millions of dollars. App. 6; ER 183-84, 302, 306-10, 344-50. Toxic plumes from stormwater runoff are detected miles off the coast of Los Angeles County in the open ocean. ER 337.

II. Statutory Framework

The Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The law forbids any person to discharge any pollutant

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of Record filed in the court of appeals. Ct. App. Dkt. Nos. 15, 19, & 25.

from a point source into navigable waters, unless expressly authorized. *Id.* §§ 1311(a), 1342, 1362(12). "Point source" is defined to mean any discrete conveyance, such as a pipe or channel. *Id.* § 1362(14). A person who seeks to discharge any pollutant into navigable waters must comply with the terms and limits of a National Pollutant Discharge Elimination System (NPDES) permit. *Id.* §§ 1311(a), 1342; *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). A violation of an NPDES permit is a violation of the Clean Water Act. 40 C.F.R. § 122.41(a).

An NPDES permit must require the discharger to conduct water quality monitoring sufficient to determine whether it is complying with its permit limits. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1). Every discharger must certify its monitoring results under threat of criminal sanction for submitting false or incomplete information, 33 U.S.C. § 1319(c)(4), and is subject to federal or citizen enforcement for any reported permit violation, *id.* §§ 1319(a)-(b), 1365(a). These provisions require every discharger to "monitor and report on its compliance with its permit." *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1483, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988); *see also* App. 39-40.

An MS4 is a "point source" under the Clean Water Act. 33 U.S.C. §§ 1342(p), 1362(14). Therefore, the discharge of pollutants from an MS4 into waters of the United States is unlawful unless the discharge complies with the terms of a valid NPDES permit. *Id.* § 1342(a), (p).

To obtain an MS4 permit, a municipality must submit an application containing a proposed monitoring program "for representative data collection" that identifies a proposed sampling location and explains "why the location is representative." 40 C.F.R. § 122.26(d)(2)(iii)(D). This representative sampling may be conducted at "instream stations" instead of particular MS4 outfalls. *Id.* The monitoring results are used "to determine compliance and noncompliance with permit conditions." *Id.* § 122.26(d)(2)(i)(F).

Congress empowered state agencies to implement the NPDES permitting program. 33 U.S.C. § 1342(b). For Los Angeles County, California law assigns that responsibility to the Regional Water Quality Control Board for the Los Angeles Region (Regional Board). Cal. Water Code § 13200(d).

III. The District's MS4 Permit

The Regional Board issued the District's current MS4 permit in 2001. App. 12-13. The permit regulates the interconnected MS4 owned by the District, Los Angeles County, and 84 incorporated cities. App. 12. The District owns and operates more of the MS4 infrastructure than all of the other co-permittee cities combined. App. 106. Each permit holder is responsible for the discharges "for which it is the operator." 40 C.F.R. § 122.26(b)(1).

The permit prohibits discharges from the MS4 that cause or contribute to the violation of water quality standards. App. 15. Water quality standards are maximum pollutant levels set by each state to protect public health and water quality. 33 U.S.C.

§§ 1311(b)(1)(C), 1313(c)(2)(A); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). These standards limit the MS4's discharges of fecal bacteria, arsenic, cyanide, mercury, and zinc, among other pollutants. App. 14.

The permit also prescribes a self-monitoring program to determine compliance with its terms. App. 17-18; ER 263. This monitoring program was designed by the District and its co-permittees. ER 353; FER 31. Under this program, sampling is conducted at designated "mass emission stations" in major rivers, including in the Los Angeles River and San Gabriel River. App. 17-18. This sampling measures MS4 discharges at instream stations, pursuant to 40 C.F.R. § 122.26(d)(2)(iii)(D), rather than from individual outfalls. App. 18-19. The mass emission stations in the Los Angeles River and the San Gabriel River are located within the portion of the MS4 owned and operated by the District; the MS4 includes channelized portions of both rivers, in addition to the drains and outfalls that discharge into the rivers. App. 18; ER 312.

The District's monitoring reports show that its MS4 discharges violated permit limits in the Los Angeles River and San Gabriel River more than a hundred times during the period covered by the complaint. App. 19. These exceedances are not disputed and include high levels of fecal bacteria, cyanide, and zinc. App. 19, 108; ER 358-64.

After the permit was adopted in 2001, the District unsuccessfully challenged it in state court. The District admitted that its discharges did not comply with water quality standards, FER 3, 6, but argued

that the permit must be read to include a "safe harbor" that relieves it of responsibility for violating water quality standards if it had tried to comply. App. 115; *In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 7 (L.A. Super. Ct. Mar. 24, 2005) (SER 234-37). The state trial and appeals courts rejected this reading of the permit. *Cnty. of L.A. v. Cal. State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 622 (Cal. Ct. App. 2006).

The permit's validity is therefore settled. The District is barred from raising a collateral attack on its permit in a federal enforcement proceeding. 33 U.S.C. § 1369(b)(2); *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1381-83 (D.C. Cir. 1999); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 77-78 (3d Cir. 1990).

IV. Procedural History

NRDC and Santa Monica Baykeeper filed this lawsuit to eliminate ongoing permit violations. The complaint alleged that the District's and Los Angeles County's polluted discharges contributed to violations of water quality standards in four rivers: the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek. ER 453-57.

The district court agreed that MS4 discharges repeatedly violated permit limits, as demonstrated by the compliance monitoring results. App. 108, 117. The court further held that the District was responsible for the pollution measured at the monitoring stations in two of the watersheds – for the Los Angeles River and San Gabriel River – because the District owned and operated the MS4 at those monitoring locations. App.

118. But the court held that plaintiffs failed to identify the location of each defendant's particular "outflows" that discharged into each river, and thus failed to establish liability as a factual matter.[2] App. 101-02. The district court entered final judgment on these claims under Federal Rule of Civil Procedure 54(b), to permit NRDC and Santa Monica Baykeeper to appeal.

The court of appeals reversed in part. The court noted that the Clean Water Act prohibits the (a) discharge (b) of a pollutant (c) from a point source (d) to navigable waters (e) in excess of permit limits. App. 10. Four of these five elements are uncontested: Polluted stormwater is a "pollutant," the District's MS4 is a "point source," App. 9, all four watershed rivers are "navigable waters," App. 42, and the District's monitoring showed violations of permit limits, App. 19. Thus, the court noted that the only relevant disputed question was a factual one: whether plaintiffs presented evidence of each defendant's discharge of pollutants into each river. App. 42.

The court concluded that plaintiffs presented adequate evidence of discharges by the District into the Los Angeles River and San Gabriel River, App. 5, 44-46, because "polluted stormwater is discharged into the two rivers" through the District's outfalls. App. 5. The record showed that "[a]t least some outfalls for the MS4 were downstream from the mass-emissions stations," and thus "there is no dispute" that the District's MS4 "adds storm-water" to the Los Angeles and San Gabriel Rivers. App. 45. The court rejected the district court's requirement that plaintiffs identify

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[2] The term "outflow" does not appear in the Clean Water Act.

which of the District's particular outfalls discharged polluted stormwater into each river, concluding that "the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds storm-water to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." App. 45.

The court of appeals agreed with the district court that the proffered evidence failed to establish the District's liability for discharges into the other two rivers, the Santa Clara River and Malibu Creek, or the County's liability for discharges into any of the four rivers. App. 47, 49. Plaintiffs therefore prevailed against one of the two defendants in the case, with respect to two of the four rivers at issue.

The District petitioned for rehearing or rehearing *en banc*, arguing, among other things, that the permit includes a "safe harbor" provision that shields the District from liability for good faith violations. The panel voted unanimously to deny the petition for rehearing. App. 2. The court issued an amended opinion expressly rejecting the District's "safe harbor" argument, holding that "no such 'safe harbor' is present in this Permit," and noting that the California state courts and the district court below had all reached that same result. App. 37-38 & n.7. The court also denied the District's petition for rehearing *en banc*, with no judge of the court requesting a vote on whether to rehear the case *en banc*. App. 2.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied because this case does not satisfy the Court's criteria for certiorari review.

The District first claims that the court of appeals held that man-made improvements to a river alter that river's status as a navigable water, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006). However, the court of appeals properly found that both the Los Angeles River and the San Gabriel River are navigable waters for their entire reach, consistent with *Rapanos*. App. 42. Every other court that has considered the question has agreed that an improved river can be a navigable water.

Second, citing *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the District argues that it cannot be liable under the Clean Water Act if its activities consist entirely of transferring water within the same water body. However, the court of appeals found that the District violated its permit because of evidence of the District's discharges from a point source (the District's MS4 outfalls) into separate navigable waters (the Los Angeles River and San Gabriel River). The court did not find the District liable based on the transfer of water within a single water body, and thus the court correctly applied *Miccosukee Tribe*.

The fact-bound holding below turned on the evidence of the District's discharges into two rivers and the specific monitoring program included in the District's permit. Because the court's holding was specific to the language of the District's permit and the

evidence of each defendant's particular discharges, the decision will not have the national impact that the District and its *amici* predict.

I. The Court of Appeals' Decision Is Consistent with This Court's Precedent

A. The Decision Below Does Not Implicate *Rapanos*

In *Rapanos*, the Supreme Court considered in what circumstances wetlands could constitute "navigable waters" under the Clean Water Act. 547 U.S. at 719, 729. A four-Justice plurality concluded that the term navigable waters is limited to "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.* at 739 (alteration in original; citation omitted). Justice Kennedy concurred in the judgment but concluded that wetlands are covered under the Clean Water Act if they have a "significant nexus" to navigable waters, meaning that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters." *Id.* at 779-80.

The District argues that review is warranted here because the court of appeals purportedly held that only "naturally occurring" waters may be navigable waters. Pet. 20. This asserted holding, the District claims, conflicts with statements in Justice Kennedy's opinion in *Rapanos* and creates confusion concerning federal jurisdiction over similar water bodies. Pet. 20-21. The District's argument might be persuasive if it were true.

But the court of appeals held no such thing. To the contrary, the court explicitly held that the Los Angeles River and San Gabriel River are navigable waters, App. 42, even though much of each river has been converted into a concrete channel. Nothing in the court's liability determination depends on whether the rivers have been altered by man-made improvements.

Attempting to manufacture a conflict with *Rapanos*, the District declares that the court of appeals "somehow" held that improvements to a waterway "alter" or "transform" its status as a navigable water. *E.g.*, Pet. 15, 16, 20. But the District never cites the Ninth Circuit's decision when it refers, eight separate times, to what the court "somehow" held. Pet. 15, 16, 20, 26, 28, 29, 42. And the court nowhere concluded that improvements to a waterway alter or transform its status. To the contrary, the court stated that the Los Angeles River and the San Gabriel River are both navigable waters. App. 42. That statement is fully consistent with Justice Kennedy's suggestion in *Rapanos*, quoted several times by the District, that the Los Angeles River is a navigable water. Pet. 16, 21, 33.

Nor did the court of appeals hold, as the District asserts, that the movement of water from a concrete channel to "'naturally occurring' portions of the rivers" constituted a discharge. Pet. 14, 19, 43. Rather, the court alluded to naturally occurring watershed rivers to distinguish the rivers from the District's MS4 outfalls and the rest of the constructed MS4 infrastructure – the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers. App. 8, 44, 46. This was relevant to show that the District adds stormwater to

both rivers from its MS4, App. 44-45, a factual point that the District does not dispute. The court of appeals never referred to "naturally occurring portions of the rivers," a term contrived by the District and then repeated throughout its petition. Pet. 14, 19, 43.

The District assigns great significance to the passing phrase "naturally occurring." Tellingly, however, the District's petition for rehearing or rehearing *en banc* made no mention of this supposedly pivotal term; nor did it argue that the court of appeals' decision is inconsistent with *Rapanos*. Ct. App. Dkt. No. 34-1. If the court of appeals had relied on a "newly-minted" theory of liability, that water flowing from a channel into "naturally occurring" portions of the rivers constituted a discharge, Pet. 19, contravening Supreme Court precedent in the process, presumably the District would have mentioned it in its petition for rehearing or rehearing *en banc*. Instead, for purposes of seeking certiorari review, the District concocted this purported holding to generate a dispute about the scope of the Clean Water Act that does not exist.

The District also claims that the court of appeals' decision is inconsistent with the Eleventh Circuit's holding in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997). Pet. 21, 35. However, that court agreed that whether a water body is a navigable water does not turn on whether it is man-made or otherwise physically altered. *Eidson*, 108 F.3d at 1342. Nor is there any intra-circuit conflict, as the District asserts (Pet. 36); the two Ninth Circuit cases cited by the District – *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532 (9th Cir. 2001), and *United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007) – reach the same result as the decision below. In any

event, certiorari is unwarranted to review a claimed intra-circuit conflict, especially because the court of appeals, without dissent, denied the District's petition for rehearing *en banc* on this question. *See Taylor v. United States*, 493 U.S. 906 (1989) (denying petition for writ of certiorari to consider intra-circuit split).

Finally, the District argues that this Court's review is necessary to provide clear guidance about Clean Water Act applicability to improved portions of navigable waters because of "confusion about what transpires when a municipality undertakes improvements within the course of navigable waters." Pet. 22. The District does not cite any cases indicating any confusion among the lower courts on this subject. Because the court of appeals' decision does not question the jurisdictional status of improved waters, it will not generate the "confusion" the District claims to fear.

B. The Decision Below Comports with *Miccosukee Tribe*

Petitioner also contends that the decision below conflicts with *Miccosukee Tribe*. Pet. 38. The District is wrong for three reasons.

First, *Miccosukee Tribe* governs what activities require an NPDES permit, an issue that is not in dispute here. In *Miccosukee Tribe*, the Supreme Court considered whether pumping water from a canal into a wetland constituted a "discharge" that required an NPDES permit. 541 U.S. at 102-03. The Court held that transferring pollutants within a single water body would not require a permit and remanded for a determination of whether the two water bodies

involved – the canal and wetland – were physically distinct or were in fact the same body of water. *Id.* at 110-12. The Court concluded that if the waters at issue "are two hydrologically indistinguishable parts of a single water body," no permit is required. *Id.* at 109, 112.

The District's MS4, unlike the water pumping station in *Miccosukee Tribe*, is defined by Congress as a point source that must be regulated by a permit. 33 U.S.C. § 1342(p); *see also* 40 C.F.R. § 122.26(b)(8) (defining MS4); App. 9. The Clean Water Act was amended in 1987 explicitly to require that MS4 discharges be regulated by the statute's NPDES permitting program. App. 29. The District's discharge of stormwater from its MS4 into the two rivers is therefore subject to a binding NPDES permit. *See* 73 Fed. Reg. 33697, 33702 n.7 (June 13, 2008) (affirming that the water transfer exception discussed in *Miccosukee Tribe* does not apply to MS4s); *Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (holding that the diversion of polluted water from a reservoir, through a tunnel, and into a creek constitutes a discharge of pollutants from a point source to navigable waters); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 679 (E.D.N.C. 2003) ("[b]ecause Defendants' ditches serve to channel and collect stormwater and other pollutants that are subsequently discharged into waters of the United States, these ditches are point sources" properly regulated by a permit).

Federal regulations further undercut the District's view. The term "discharge of a pollutant" is defined to include "surface runoff which is collected or

channelled" by man. 40 C.F.R. § 122.2; *see also Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994). In *Mokelumne River*, the defendants "channelled" water and drainage into a river by diverting runoff, just like the District's MS4 does here, and thus it was "conclusively establish[ed] that defendants 'discharge a pollutant'" into the river. 13 F.3d at 308. The court below correctly held that MS4 operators "require permits for channeling" stormwater. App. 46 (citing 40 C.F.R. § 122.2).

Second, the *Miccosukee Tribe* exception applies only to activities occurring solely within a single water body or between two portions of the same water body. 541 U.S. at 112; *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) (holding that the exception discussed in *Miccosukee Tribe* "only applies when pollutants are transferred from one navigable water to another"). The District's MS4 is not a "water body" identical to the rivers. It is a constructed physical infrastructure that includes catch basins, gutters, drains, pipes, and outfalls, in addition to channelized portions of some natural watercourses. App. 8; ER 243, 312. The court of appeals held that it is "undisputed" that the District's MS4 "collects and channels stormwater runoff from across the County." App. 8. Collecting polluted stormwater from parking lots, streets, and industrial sites, and then discharging it through gutters and drains into local rivers is not a transfer of water within a single water body. *See Huffman*, 625 F.3d at 167. The District cannot and does not argue that its MS4 – composed of gutters, storm sewers, and underground pipes – is in any way "hydrologically indistinguishable"

from the two rivers, as would be required for *Miccosukee Tribe* to apply. 541 U.S. at 109, 112.

The District states that the regulatory definition of "outfall" excludes "conveyances which connect segments of the same stream." Pet. 31 (citing 40 C.F.R. § 122.26(b)(9)). But the District never claims that its MS4 simply "connect[s] segments of the same stream." Nor could it. The District's MS4 includes external pipes and outfalls – thousands of them – that are separate from the rivers at issue in this case and that discharge polluted stormwater into those rivers. App. 8; ER 312.[3]

The court of appeals thus found that the District was liable for permit violations based on evidence of its discharges *from* the MS4 *to* the two rivers. App. 5, 45. The District misrepresents the court's decision when it claims that the court held "it was not necessary to show that petitioner's MS4 added pollutants to the rivers." Pet. 38-39. To the contrary, the court reviewed the evidence and concluded that it was undisputed that the District added pollutants to the rivers from its outfalls. App. 5 ("Specifically, Plaintiffs provided evidence that . . . polluted stormwater *is discharged* into the two rivers" by the District) (emphasis added); App. 44 ("[T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River

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[3] The *amicus* brief filed by the Florida Stormwater Association admits what the District avoids mentioning: that the District's stormwater discharges are "transmitted through ditches, culverts, and other devices . . . *into* the receiving body of water," FSA Br. at 7 (emphasis added), effectively acknowledging that the District's *Miccosukee Tribe* argument is wrong.

and San Gabriel River."); App. 45 ("[T]here is no dispute" that the District's MS4 "*adds* storm-water *to* the Los Angeles and San Gabriel Rivers") (emphasis added). The holding in both courts below turned on the sufficiency of the factual evidence proffered. The court of appeals reversed the district court on "the factual issue on which the district court granted summary judgment . . . – whether any evidence in the record shows Defendants discharged stormwater that caused or contributed to water-quality violations." App. 40.

The court of appeals properly stated the rule of law that the District asserts should apply here. The court held that there must be proof of a discharge from an outfall into a navigable water to establish the District's liability. App. 42. Even assuming incorrectly that the court erred in finding that the factual evidence demonstrated such a discharge from the District's outfalls into two of the four rivers, App. 44-45, review should not be granted to consider the asserted misapplication of a properly stated rule of law. Supreme Court Rule 10.

Third, the District in reality is not challenging the court's liability determination but the compliance monitoring contained in its permit. Under the permit, the District's MS4 discharges are properly sampled not at one of the District's thousands of individual outfalls but at representative, instream locations that were proposed by the District itself in its permit application. App. 18, 37-40; ER 353. As the Regional Board explained, "the Permit incorporates the type of monitoring scheme that the permittees expressly requested in their permit application. That scheme determines compliance not at any city's individual

outfalls, but in-stream at 'mass emissions stations' . . . ." FER 31.

This monitoring scheme in the District's permit is both lawful and logical. 40 C.F.R. §§ 122.48(b), 122.41(j)(1), 122.26(d)(2)(iii)(D); 55 Fed. Reg. 47990, 48046 (Nov. 16, 1990). Federal regulations allow compliance monitoring to be conducted at a "representative" location that is not exactly at the point of discharge. 40 C.F.R. §§ 122.48(b), 122.41(j)(1). This can include "outfalls," "field screening points," or "instream stations." *Id.* § 122.26(d)(2)(iii)(D). The District's argument here – that monitoring conducted instream cannot be used to establish its liability – runs counter to the applicable Clean Water Act regulations, and the court of appeals correctly held that the District's assertion "if accepted would emasculate the [p]ermit." App. 34. The permit's validity is settled, and the District cannot attack it now. 33 U.S.C. § 1369(b)(2); *Gen. Motors Corp.*, 168 F.3d at 1381-83.

The fact that the District's discharges are monitored "instream" at mass emission stations does not mean that the District is simply moving water "within" a stream, as the District claims. The court's reliance on the permit's instream monitoring to measure compliance is consistent with the Clean Water Act and the language of the permit and does not implicate *Miccosukee Tribe*.

The consequence of the District's argument would be that the protections of the Clean Water Act could never apply to its discharges into these rivers. The District would be operating an entirely unregulated MS4, because the District's collection and discharge of polluted stormwater from parking lots, streets, and

industrial sites into rivers would be considered simply a "transfer" of water within the same water body. As the District admitted below, under its theory, it could never be liable for violating the permit, even if its discharges "were so polluted with oil and grease that they were on fire as they came out of the system." App. 43-44 n.8. The court of appeals correctly rejected this position as "untenable." App. 43 n.8.

II. The District's Petition Does Not Raise Any Issue of National Significance

The remaining issues raised by the Petitioner and *amici* do not rise to the level of national importance that warrants this Court's review.

The District alludes vaguely to impacts on "flood control planning" based on "uncertainty" about its "potential obligations," Pet. 44-45, but fails to say what those impacts are or how it could suffer any uncertainty. As explained above, all MS4s, including municipal flood control districts, have been defined as point sources subject to Clean Water Act regulation since Congress amended the statute in 1987. App. 29. The District's obligations are clear: Discharges from its MS4 into navigable waters must comply with the limits in the NPDES permit. App. 9-10; *see also Huffman*, 625 F.3d at 166 ("Both those who generate pollution and those who superintend ongoing discharges must obtain NPDES permits.").

Moreover, contrary to the District's suggestion, Pet. 43-44, the same solutions that would ameliorate permit violations would make the region *less* susceptible to flooding, not more, by promoting natural filtration of stormwater that would lessen the

discharges from the District's MS4. The Regional Board, when it adopted the permit, found that the benefits of permit implementation would include reduced flood damage, fewer illnesses from swimming in contaminated water, enhanced commercial fishing, improved aesthetic value, and better drinking water quality. ER 309-10. Flood control planning will therefore be strengthened, not compromised, by the District's permit compliance.

The District also insists that it is unlike a typical industrial discharger because its MS4 performs a public function in collecting and discharging stormwater. Pet. 43-44. The courts have unanimously held that a discharger's "intentions" are irrelevant; "the statute takes the water's point of view." *Huffman*, 625 F.3d at 167; *see also Mokelumne River*, 13 F.3d at 308. The Clean Water Act bans unpermitted discharges by "any person," 33 U.S.C. § 1311(a), and defines "person" to include states and municipalities in addition to private parties, *id.* § 1362(5). This ban is "sweeping in scope." *Huffman*, 625 F.3d at 162.

Finally, *amicus* the National Association of Flood and Stormwater Management Agencies (NAFSMA) claims that the ruling below "would throw a monkey wrench into the long-established approach to NPDES permitting and enforcement in general," which purportedly relies upon "measuring compliance for all permittees at the point of discharge from their outfalls into the receiving waters." NAFSMA Br. at 13. But NAFSMA ignores the federal regulation allowing MS4 compliance monitoring to be conducted at "instream stations" instead of at the point of discharge, 40 C.F.R. § 122.26(d)(2)(iii)(D), and the language of the District's permit, which requires compliance monitoring to be

conducted at the mass emission stations. App. 37, 40; ER 263. Other dischargers and regulatory agencies are free to agree on a different compliance monitoring scheme for their storm sewer systems if they choose, including monitoring from representative outfalls. 40 C.F.R. § 122.26(d)(2)(iii)(D), (d)(2)(i)(F). The court of appeals' decision interpreted only the District's permit and would not apply to a different discharger's permit with different monitoring provisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER 14, 2011

REPLY BRIEF

No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

RESPONDENTS' FAILURE TO ACKNOWLEDGE, LET ALONE DEFEND THE NINTH CIRCUIT'S UNTENABLE CONSTRUCTION OF THE CLEAN WATER ACT AND THIS COURT'S DECISIONS TACITLY CONCEDES THAT THE CASE REQUIRES INTERVENTION BY THIS COURT.

The Ninth Circuit's departure from the statutory and regulatory provisions of the Clean Water Act ("CWA") and the decisions of this Court is so profound that respondents – highly experienced institutional litigants on CWA issues – do not even attempt to defend the Ninth Circuit's actual reasoning. Instead, respondents pretend that the Ninth Circuit opinion says something quite different than it does. Indeed, respondents' attempt to rehabilitate the opinion relies on arguments that the Ninth Circuit expressly rejected.

The tip off that respondents are attempting to craft a different Ninth Circuit opinion than the one at issue in the petition, is that nowhere in their Brief In Opposition do they quote in full any passage of the Ninth Circuit's opinion. Rather, respondents string cite portions of the opinion and quote snippets of language to, in essence, manufacture a holding that simply is not there. Yet, petitioner and its amici do not have the luxury of ignoring the plain language of the Ninth Circuit's opinion, which sows confusion in the manner in which flood control agencies and other municipalities may undertake extensive and enormously

expensive improvements to safeguard the public from flooding.

A. The Ninth Circuit Expressly Held That A Discharge Of Water Occurred When Storm-water Flowed Past The Monitoring Stations In The Channelized Portions Of The Rivers Into "Naturally Occurring" Portions Of The Same Rivers, And Expressly Rejected Respondents' Theory Based On Alleged Discharges From Catch Basins, Gutters, Drains, Pipes, And Outfalls Along The Banks Of The Rivers.

Respondents acknowledge that the District's MS4 consists of improvements within the rivers themselves, as well as infrastructure outside of the river. As they note: "It is a constructed physical infrastructure that includes catch basins, gutters, drains, pipes, and outfalls, in addition to channelized portions of some natural watercourses." (Brief In Opposition ("BIO") 16; *see also* BIO 6 ("the MS4 includes channelized portions of both rivers, in addition to the drains and outfalls that discharge into the rivers").) Moreover, respondents admit that the monitoring stations required by the Permit are in portions of the rivers channelized and improved by the District (BIO 6), which is not surprising, since respondents previously admitted it in the district court. (Petition for Writ of Certiorari ("Pet.") 26 n.4) The Ninth Circuit similarly understood that the monitoring stations were located in the rivers, citing the Los Angeles

County Department of Public works website as accurately depicting the locations of the monitoring stations. (App. 18 n.4.)[1]

Respondents attempt to blur the distinction between these different parts of the District's MS4 and by so doing gloss over the Ninth Circuit's plain holding. Thus, respondents repeatedly refer to the Ninth Circuit having found that there was a "discharge" from one of petitioner's "outfalls," which they describe as "the constructed MS4 infrastructure – the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers" (BIO 12) and "gutters and drains" or "external pipes and outfalls – thousands of them. . . ." (BIO 16-17.)

The Ninth Circuit, however, expressly rejected respondents' attempt to premise a violation on the mere fact that the District had outfalls, i.e., various pipes, culverts or drains, that discharged into the rivers upstream from the monitoring stations. (App.

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[1] *See*, *Section Two: Site Descriptions*, Los Angeles Cnty. Dept. of Pub. Works, p. 2-4, *available at* http://dpw.lacounty.gov/wmd/npdes/9899_report/SiteDesc.pdf and *Section Two: Site Descriptions*, Los Angeles Cnty. Dept. of Pub. Works, p. 2-2, *available at* http://dpw.lacounty.gov/wmd/NPDES/2006-07_report%5CSection%202.pdf (stating that "The San Gabriel River, at the gauging station, is a grouted rock-concrete stabilizer along the western levee and a natural section on the eastern side" and that "[f]low measurement and water sampling are conducted in the grouted rock area along the western levee of the river" and noting that at the site of the Los Angeles River monitoring station "the river is a concrete-lined trapezoidal channel").

41-42.) In so doing, it affirmed the district court, which had similarly found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 outflows at or near the time the exceedances were observed. (App. 100.)[2] Nor did respondents provide any evidence that the mass-emissions monitoring stations themselves are located at or near one of petitioner's outflows. (*Id.*) The district court emphasized, that under the Permit, the District was only a co-permittee and that it could not be held liable for exceedances that may have been caused by discharges from outflows maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App. 101-02.)

Rather, the Ninth Circuit found a "discharge" from an "outfall" for purposes of imposing CWA liability based solely upon movement of water from the District's channelized portions of the rivers into alleged "navigable" portions of the same rivers. Specifically, the court found that the monitoring stations (which respondents concede are in the rivers) were in concrete channels maintained by the District as part of its MS4 and hence when polluted water from any upstream source entered these channels

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[2] This is why respondents' assertion that reversal of the Ninth Circuit's opinion would leave them without any remedy against petitioner for such discharges (BIO 19) is patently false – respondents simply failed to present evidence to support such claims.

and flowed back into the "naturally occurring" portions of the rivers, this constituted a "discharge" from an "outfall" for purposes of imposing liability under the CWA. The court's holding is plain:

> [T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River.

(App. 44.)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed

> out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App. 45.)

It is beyond dispute that the Ninth Circuit found a CWA violation based solely on the movement of water containing pollutants through the District's channelized portions of the rivers.

B. The Entire Premise Of The Ninth Circuit's Decision Is That Improvements To A Navigable Water Of The United States Such As Channelization As Part Of Flood Control Or A Municipal Separate Storm Sewer System, Alter Its Status, A Result That Is Squarely At Odds With The Clean Water Act, This Court's Decision In *Rapanos v. United States*, And The Decisions Of Other Circuits.

As noted in the Petition, the linchpin of the Ninth Circuit's decision is its finding that a "discharge" from an "outfall" occurred when water flowed through the monitoring stations located in the District's channelized portions of the rivers and into navigable waters. According to the court, even though the monitoring stations are in the channelized portions of the rivers, "[a]s a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a *naturally occurring* Watershed River." (App. 44 (emphasis added).)

The plain and necessary implication of this holding is that when waters of a navigable river flow into portions of a river that have been channelized or otherwise improved for flood control, that somehow these channelized portions are distinct from the navigable waters themselves. The language of the opinion makes it clear that the Ninth Circuit is drawing this distinction based upon the "fact" that some portions of the river are "man-made," as distinct from a "naturally occurring Watershed River."

Respondents acknowledge, as they must, that given clear statutory and case authority, "an improved river can be a navigable water." (BIO 10.) But they contend that the Ninth Circuit found that "the Los Angeles River and the San Gabriel River are navigable waters, App. 42, even though much of each river has been converted into a concrete channel." (BIO 12.) Yet, the cited passage from the Ninth Circuit's opinion merely states that the "Watershed Rivers are all navigable waters" (App. 42), a necessary fact for CWA jurisdiction. The opinion's only references to man-made improvements are in the passages petitioner quoted above, where the court plainly distinguished between man-made portions of the rivers maintained by the District as part of its MS4, from "naturally occurring Watershed Rivers." (App. 44.)

Respondents try to explain away the Ninth Circuit's reference to "naturally occurring Watershed Rivers" by again turning a blind eye to what the Ninth Circuit actually decided, and instead, remarkably

claiming the Ninth Circuit found a violation based upon the very argument the court rejected. Respondents assert that:

> [T]he court alluded to naturally occurring watershed rivers to distinguish the rivers from the District's MS4 outfalls and the rest of the constructed MS4 infrastructure – *the storm drains and thousands of miles of underground sewer pipes that ultimately discharge to the rivers.*

(BIO 12 (emphasis added).)

That assertion is belied by the plain language of the opinion cited above. The Ninth Circuit did not find a CWA violation based upon a discharge from storm drains or underground sewer pipes. It found a violation based upon an artificial and improper distinction between channelized portions of the rivers and allegedly "naturally occurring" portions of the *same* rivers. Again, respondents acknowledge that the District's MS4 consists both of infrastructure outside of the rivers, and infrastructure in the rivers – including the monitoring stations in the channelized portions of the rivers. That respondents have to omit the latter in attempting to defend the Ninth Circuit's decision speaks volumes as to the utter lack of any case or statutory basis for the Ninth Circuit's rationale.

Respondents acknowledge that if petitioner's characterization of the Ninth Circuit's decision is true, it most assuredly conflicts with Justice Kennedy's

opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) and creates confusion concerning federal jurisdiction over similar waterbodies. (BIO 11.) The egregious nature of the Ninth Circuit's opinion is manifest, and underscored by the fact that amici from across the nation have recognized the alarming uncertainty it has injected into basic day-to-day planning and operation of municipal stormwater systems throughout the country.

C. By Premising A CWA Violation On A Discharge Resulting From Waters Of The Los Angeles And San Gabriel Rivers Passing Through The District's Channels Within The Rivers, And Into Portions Of The Same Rivers, The Ninth Circuit's Decision Is Contrary To *South Florida Water Management District v. Miccosukee Tribe of Indians*, Which Bars Claims Premised Upon Mere Transfer Of Water Within A Single Body Of Water.

Respondents acknowledge the clear holding of *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that merely transferring pollutants within a single water body would not require a NPDES permit. (BIO 14.) They argue, however, that the Ninth Circuit's opinion is consistent with *Miccosukee* because the District's MS4 does not transfer water within a single body of water. (BIO 16-17.) Respondents assert "[c]ollecting polluted stormwater from parking lots, streets, and

industrial sites, and then discharging it through gutters and drains into local rivers is not a transfer of water within a single water body" (BIO 16) and that the "District's MS4 includes external pipes and outfalls – thousands of them – that are separate from the rivers at issue in this case and that discharge polluted stormwater into those rivers." (BIO 17.)

Once again, respondents have essentially redrafted the Ninth Circuit opinion, which did not find a discharge based upon water flowing from the District's "gutters and drains" or "external pipes and outfalls . . . that are separate from the rivers at issue in this case. . . ." The only portions of the MS4 from which the Ninth Circuit found there to be a "discharge" were channelized portions of the rivers operated by the District for flood control purposes as part of its MS4. (App. 44-45.)[3] Quite simply, the Ninth

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[3] Moreover, respondents' assertion that the District is merely challenging the Permit's requirements and not imposition of liability based on the court's strained construction of what constitutes a discharge under the CWA (BIO 18) is untenable. Again, this is precisely the argument the Ninth Circuit *rejected*:

> Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance" this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. [Citations.] While it may be undisputed that exceedances

(Continued on following page)

Circuit concluded that the District was liable solely because it conveyed polluted water – whatever its source – through its portions of the Los Angeles and San Gabriel Rivers, i.e., the water enters the channelized portions of the rivers, goes past the monitoring stations, and is discharged from the channelized portions into the "naturally occurring Watershed River[s]." (*Id.*) This is the quintessential transfer of pollutants within a single body of water that this Court rejected in *Miccosukee*.

Moreover, to the extent that respondents are contending that there can be a "discharge" of a pollutant based merely upon water flowing through an improved channelized section of a navigable water, so long as the MS4 also includes improvements beyond just the channelized portions of the river (BIO 16), then creation of such an exception to *Miccosukee* and the resulting expansion of the statutory and regulatory scope of the MS4 provisions of the CWA mandate review by this Court. The need for intervention is again underscored by the concerns expressed by amici as to the impact of the Ninth Circuit's decision on

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> have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives *are prohibited*."

(App. 41-42 (emphasis in original).)

The court then found a discharge under the CWA, as described in the text above. (App. 44-45.)

their operation of MS4s, including flood control measures undertaken within navigable rivers to protect the public safety.

D. Review Is Essential To Provide Clear Guidelines On Fundamental Provisions Of The Clean Water Act And Specific Provisions Concerning Regulation Of Stormwater.

As noted, respondents concede that if petitioner's characterization of the Ninth Circuit's decision is accurate, the case indeed warrants review by this Court. (BIO 11.) Municipalities must improve traditional navigable waters for purposes of flood control. Whether these improvements alter the status of these navigable waters under the CWA (as well as under other federal statutes that regulate navigable waters such as the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 401 et seq.) such that the waterbody becomes, in the words of the Ninth Circuit, "distinct" as "a matter of law and fact" (App. 44) is an issue of national importance. The Ninth Circuit opinion creates confusion regarding obligations imposed on local entities arising from basic flood control. The alarming and disruptive nature of the Ninth Circuit's opinion is underscored by the concerns expressed by amici from across the country who must necessarily engage in extensive planning and commitment of financial resources in performing the core public service of flood control, a task made infinitely more difficult because of the uncertainty created by the

Ninth Circuit's opinion. (*See, e.g.*, Brief of Amicus Curiae National Association of Flood and Stormwater Management Agencies at 13; Brief of Amicus Curiae The California Stormwater Quality Association at 4-5, 17-18.)

The opinion similarly causes confusion as to the jurisdiction of the Environmental Protection Agency and Army Corps of Engineers to regulate those portions of rivers that have been improved, and are hence, under the Ninth Circuit's reasoning, purportedly distinct from the navigable waters themselves. (Pet. 36-38.)

Even were the Ninth Circuit's opinion limited solely to those states within its jurisdiction, or even to petitioner alone, its impact would be profound, directly affecting the manner in which the District performs its basic function of safeguarding the persons and property of millions of citizens.

This Court has never addressed the scope of the CWA's stormwater permitting requirements. The Ninth Circuit's radical departure from what had been assumed to be established law makes it necessary for the Court to now do so.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioner urges that the petition for writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner had caused or contributed to exceedances of water-quality standards in the operation of its municipal separate storm sewer system, in violation of petitioner's Clean Water Act permit.

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In the Supreme Court of the United States

No. 11-460

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Respondents sued petitioner, an operator of a municipal separate storm sewer system (ms4)[1] in the Los Angeles area, for violating the terms of a permit issued under the Clean Water Act (CWA or Act). The district

[1] Consistent with the court of appeals' convention (see Pet. App. 8 n.2), this brief uses "ms4" to refer to municipal separate storm sewer systems in general, and "MS4" to refer to the Los Angeles County system at issue in this case.

court granted summary judgment for petitioner, holding that respondents had presented insufficient evidence that petitioner was responsible for the permit violation. The court of appeals reversed in pertinent part. Pet. App. 1-50.

1. a. The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. 1311(a), 1362(12). For most point-source discharges, as relevant here, regulated entities achieve compliance by obeying the terms of a permit issued under the National Pollution Discharge Elimination System (NPDES) pursuant to CWA Section 402, 33 U.S.C. 1342.

NPDES permits contain "effluent limitation[s]" that restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that may be discharged into navigable waters. 33 U.S.C. 1362(11). NPDES permits use effluent limitations in two complementary ways. First, technology-based limitations generally reflect the level of pollution control that can be achieved by point sources using various levels of pollution-control technology. 33 U.S.C. 1311, 1314; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). Second, more stringent water-quality based limitations must be imposed when necessary to ensure that the receiving waters meet applicable water-quality standards. 33 U.S.C. 1311(b)(1)(C); 40

C.F.R. 122.44(d)(1); see *Arkansas* v. *Oklahoma*, 503 U.S. 91, 104-105 (1992).

In 1987, Congress amended the Act to require the Environmental Protection Agency (EPA) to implement a comprehensive national program for addressing stormwater discharges. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69 (codified at 33 U.S.C. 1342(p)). Stormwater, which collects on impermeable surfaces like parking lots, driveways, and roads, often picks up pollutants like heavy metals, pathogens, and toxins from those surfaces. Pet. App. 6. To prevent flooding, most municipalities have built infrastructure, such as an ms4, to collect stormwater and carry it away from homes, businesses, and roads. Federal regulations implementing the CWA define an ms4 as a publicly owned or operated "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that discharges to waters of the United States. 40 C.F.R. 122.26(b)(8), (18) and (19). An ms4 generally has numerous "outfall[s]," which are "point source[s]" where the ms4 discharges into waters of the United States. 40 C.F.R. 122.26(b)(9).

Pursuant to Section 402(p)(2) and its implementing rules, discharges from ms4s serving populations of 100,000 or more are subject to NPDES permits. 33 U.S.C. 1342(p)(2)(C) and (D); 40 C.F.R. 122.26. Those permits have several features tailored to the operation of an ms4. Because ms4s do not typically employ end-of-the-pipe wastewater treatment, the Act and implementing regulations require controls to reduce what enters the system through a stormwater management program established as part of the NPDES permit. 33 U.S.C. 1342(p)(3)(B)(iii); 40 C.F.R. 122.26(d)(2)(iv).

Such controls therefore may contain measures that reduce stormwater discharges in the first instance, such as floodplain management controls, wetland-protection measures, best management practices for new subdivisions, and emergency spill-response programs. 40 C.F.R. 122.26(d)(1)(v). Permit writers for an ms4 may also choose to "require strict compliance with state water-quality standards." *Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

Under the CWA, stormwater permits may be issued on a system-wide or jurisdiction-wide basis. 33 U.S.C. 1342(p)(3)(B)(i) and (iii); 40 C.F.R. 122.26(a)(3)(ii). Thus, several local governments may jointly apply for a single permit that governs interconnected systems discharging into the same waters of the United States. 40 C.F.R. 122.26(a)(3)(ii)-(iv) and (d). Under such a permit, a co-permittee "is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. 122.26(b)(1). Co-permittees may propose, for example, that the permit contain separate stormwater management programs that place different obligations on each permittee to implement best management practices. 40 C.F.R. 122.26(d)(2)(iv).

Like other NPDES permits, those ms4 permits also establish monitoring protocols to assess compliance. An ms4 may have hundreds or even thousands of outfalls that discharge to "waters of the United States." An applicant for an ms4 permit is required to propose a "monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment." 40

C.F.R. 122.26(d)(2)(iii)(D). Accordingly, subject to the permitting authority's approval, a permit applicant may choose a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two.

b. Under CWA Section 402(b), States may seek EPA authorization to administer the NPDES permitting program. 33 U.S.C. 1342(b). EPA has authorized the State Water Resources Control Board (State Board) to administer the NPDES program in California. The State Board, in turn, has delegated that authority to nine Regional Water Quality Control Boards, including the Los Angeles Regional Water Quality Control Board (Regional Board). See *City of Arcadia* v. *State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240-241 (Cal. App. 2010). Under California law, a permittee may seek State Board review of any provision of an NPDES permit issued by a Regional Board. Cal. Water Code § 13320. The permittee may appeal the State Board's decision to the California state courts. *Id.* at § 13321; see *County of Los Angeles* v. *California State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 621-622, 627 (Cal. App. 2006).

c. Under the CWA's citizen-suit provision, "any citizen may commence a civil action on his own behalf against any person * * * who is alleged to be in violation of [] an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). An "effluent standard or limitation" includes any term or condition of an approved NPDES permit. 33 U.S.C. 1365(f)(6); see *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) ("In the absence of federal or state enforcement, private citizens may commence civil actions against any person 'alleged to be in violation of' the conditions of either a federal or state

NPDES permit.") (quoting 33 U.S.C. 1365(a)(1)). A successful enforcement action may result in injunctive relief and monetary penalties. 33 U.S.C. 1365(a).

2. a. Petitioner, along with Los Angeles County (County) and 84 cities, obtained an NPDES permit from the Regional Board for an ms4 comprised of thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections over a large area of Southern California. Pet. App. 106. Petitioner owns, operates, and maintains approximately 500 miles of open channels and 2800 miles of storm drains—more than all the other co-permittees combined. *Ibid.* The MS4 collects stormwater runoff from across Los Angeles County and channels it into the region's rivers, including the Los Angeles and San Gabriel Rivers. *Id.* at 8.

The permit at issue requires strict compliance with state water-quality standards, prohibiting "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." C.A. E.R. 202; see Pet. App. 15. The permit contemplates compliance with those standards through, *inter alia*, implementation of the control measures outlined in the permit's stormwater quality management program. *Ibid.* The permit also establishes a monitoring and reporting program, as proposed by petitioner and its co-permitees in their application, to ensure compliance with its terms. C.A. E.R. 186-187, 258, 263; see 40 C.F.R. 122.26(d)(2)(iii)(D). Petitioner, as the Principal Permittee (C.A. E.R. 204), is responsible for monitoring the instream mass-emissions stations and submitting a report identifying the possible sources of any exceedances. *Id.* at 260-261, 263.

b. When the permit was issued, petitioner, along with other co-permittees, challenged it in California state court on several grounds. See *County of Los Angeles*, 50 Cal. Rptr. 3d at 621-622. Petitioner did not challenge the permit's monitoring program, however, or claim that the program would unfairly hold it responsible for violations of the water-quality standards that petitioner did not cause or contribute to. The trial court upheld the permit, and the state appeals court affirmed. *Ibid.*

3. Respondents commenced this action under the CWA's citizen-suit provision. They alleged, *inter alia*, that petitioner and the County were in violation of the MS4 permit by causing or contributing to exceedances of water-quality standards in the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek watersheds. The parties filed cross-motions for summary judgment on the Los Angeles River and San Gabriel River claims. Pet. App. 103-105. The following facts were not disputed: (1) mass-emissions monitoring data repeatedly showed exceedances for a number of pollutants, *id.* at 108; (2) stormwater conveyed in petitioner's portion of the MS4 included those pollutants, *id.* at 117; (3) the mass-emissions monitoring stations were downstream from where petitioner's and others' storm drains joined the relevant water bodies, *id.* at 116; and (4) mass-emissions monitoring stations for the Los Angeles and San Gabriel Rivers are located in petitioner's section of the MS4, *id.* at 107-108.

After initially denying both sides' motions for summary judgment on the watershed claims (Pet. App. 114-123), and after receiving supplemental briefing, the district court ultimately granted summary judgment for petitioner on all four watershed claims. *Id.* at 98-102.

The court rejected petitioner's arguments that (1) flow from their MS4 outlets does not constitute a discharge of pollutants because petitioner does not generate the pollutants; (2) the permit provides a safe harbor for violations of effluent limits if the permittee is complying with the iterative process to remedy violations; (3) the presence of pollutants from other sources absolves petitioner of responsibility for permit violations; and (4) data collected at the mass-emissions station cannot be the basis for determining a permit violation. *Id.* at 114-117, 122. The court also held that it was not necessary to pinpoint the source of the pollutants in order for the permit to be violated because the "Permittees, collectively, are violating the permit if 'discharges from the MS4' are 'caus[ing] or contribut[ing] to the violation of Water Quality Standards or water quality objectives.'" *Id.* at 117 (quoting C.A. E.R. 202 (Los Angeles County, et al., NPDES Permit (Permit) Part 2.1 at 23)).[2]

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[2] The district court agreed with the proposition that "because the mass emissions monitoring stations for [the Los Angeles and San Gabriel Rivers] are located in the portion of the MS4 owned and operated by [petitioner], [petitioner] is responsible for the pollutants in the MS4 at this point." Pet. App. 118. The court suggested, however, that this did not necessarily mean that petitioner had discharged polluted stormwater, because the monitoring station itself was not a point source and the court could not determine from the record where the MS4 ended and the rivers began. *Id.* at 119. The court acknowledged evidence that petitioner had released runoff through outfalls upstream of the mass-emissions stations, and it held that these outlets are "discharges" within the meaning of the CWA. *Id.* at 115, 120-21. The court nevertheless concluded that, in order to establish petitioner's liability, "[respondents] would need to present some evidence (monitoring data or an admission) that some amount of a standards-exceeding pollutant is being discharged through at least one [of petitioner's] outlet[s]." *Id.* at 121.

The district court concluded, however, that "although the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the Permit or not, that data is not sufficient to enable the Court to determine that [petitioner] is responsible for 'discharges from the MS4 that cause or contribute to the violation' of standards under Part 2.1 of the Permit, since a co-permittee is responsible 'only for a *discharge* for which it is the operator.'" Pet. App. 121 (quoting C.A. E.R. 199 (Permit ¶ G.4 at 20); emphasis added by the district court). The court also determined that monitoring data from sampling in storm drains operated by petitioner, which discharged into the Los Angeles River upstream of the mass-emissions monitoring stations, was insufficient because there was no clear indication that the samples were collected at or near an "outflow," rather than in the storm drain or watercourse. *Id.* at 100-101. The court held that petitioner could be held liable for violating Part 2.1 of the permit only if it had discharged pollutants from a point source at or near the mass-emissions station at the time the exceedances were measured. *Id.* at 101-102.

The district court directed entry of a partial final judgment under Federal Rule of Civil Procedure 54(b), stating that "[t]he parties and the Court would benefit from appellate resolution of the central legal question underlying the watershed claims: what level of proof is necessary to establish defendants' liability." Pet. App. 24 (brackets in original).

4. a. The court of appeals reversed in relevant part. Pet. App. 1-50.[3]

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[3] The court of appeals affirmed the district court's grant of summary judgment in petitioner's favor with respect to respondents' claims of

The court of appeals stated that resolution of respondents' claims against petitioner and the County "requires us to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances." Pet. App. 25. With respect to the first inquiry, the court of appeals agreed with the district court that, under the terms of the MS4 permit, "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." *Id.* at 40; see *id.* at 27-40.

With respect to the second, "factual" inquiry, the court of appeals found sufficient evidence showing that petitioner had discharged stormwater that caused or contributed to the permit violations. Pet. App. 40-49. The court explained that the monitoring stations for the Los Angeles and San Gabriel River are located in a portion of the MS4 owned and operated by petitioner; that the monitoring stations had detected pollutants in excess of the amounts authorized by the permit; and that polluted stormwater was discharged from the MS4 into the rivers. *Id.* at 44-45, 49. "As a matter of law and fact," the court added, "the MS4 is distinct from the two navigable rivers." *Id.* at 44.

The court of appeals further explained that the MS4 is a "point source"; that the rivers are "navigable waters"; and that "[a]t least some outfalls for the MS4 were downstream from the mass-emissions stations." Pet. App. 45. The court stated that a "discharge from a point source occurred when the still-polluted stormwater

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CWA violations in the Santa Clara River and Malibu Creek. Pet. App. 5-6, 47-48. Because respondents have not sought review of that aspect of the court of appeals' decision, those claims are not before this Court.

flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." *Id.* at 44-45. The court rejected petitioner's contention that "merely channeling" pollutants created by other permitees cannot create CWA liability. *Id.* at 45; see *id.* at 45-47. The court relied on, *inter alia*, this Court's statement that "the definition of 'discharge of a pollutant' contained in [33 U.S.C.] § 1362(12) . . . *includes* within its reach point sources that do not themselves generate pollutants." *Id.* at 46-47 (quoting *South Florida Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)) (emphasis added by court of appeals).

b. Petitioner filed a petition for rehearing. Petitioner argued, *inter alia*, that the panel had made a factual error in assuming that the part of the MS4 infrastructure in which the mass-emissions monitoring stations are located is distinct from the Los Angeles and San Gabriel Rivers. See C.A. Pet. for Reh'g 3-4. The court of appeals denied the petition. Pet. App. 2.[4]

DISCUSSION

Contrary to petitioner's contention (Pet. i, 20-21), the court of appeals did not hold, in conflict with other circuits, that "navigable waters" are limited to "naturally occurring" bodies of water, or that man-made improvements to a river take it outside the protections of the CWA. Nor did the court of appeals hold, in contravention of *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (*Miccosukee*), that a transfer of water within a single water

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[4] At that time, the panel amended its initial opinion, but only to address and reject an unrelated argument raised in the petition for rehearing. Pet. App. 37-38.

body constitutes a "discharge of any pollutant" under the CWA. See Pet. i, 21-22.

Rather, the court of appeals held only that petitioner was responsible for violations of the specific CWA permit at issue because, in the court's view, petitioner's pollutant discharges had caused or contributed to violations of the permit's water-quality standards. Petitioners' arguments that the court of appeals reached sweeping legal conclusions on "navigable waters" and water transfers, contrary to the precedents of both that court and this Court, are based on a single sentence in the opinion below. It is far more likely that the sentence reflects a mistaken understanding as to the structure of the MS4 and the location of the monitoring stations. Any such factual mistake, irrelevant to whether a permit violation had occurred and unaccompanied by any legal error likely to affect the disposition of future cases, does not warrant this Court's review.

A. The Court Of Appeals' Decision Is Based On Facts Specific To The MS4 Permit At Issue

The two questions before the court of appeals were (1) whether respondents had proved a violation of the NPDES permit at issue, and (2) if so, whether respondents had proved that petitioner was responsible for that violation. Pet. App. 25. Both of those inquiries turn on the specific terms of petitioner's MS4 permit and respondents' proffered evidence of petitioner's violation. With respect to respondents' claims regarding the Los Angeles and San Gabriel Rivers, the court of appeals concluded that violations of the MS4 permit had occurred and that petitioner's discharges had caused or contributed to those violations.

1. Respondents alleged that petitioner had violated the NPDES permit by causing or contributing to exceedances of water-quality standards in the Los Angeles and San Gabriel Rivers. Pet. App. 104. Part 2.1 of the MS4 permit requires adherence to the water-quality standards set for the receiving waters. C.A. E.R. 202. Under the terms of the permit, as proposed by petitioner and approved by the State, data from instream mass-emissions monitoring stations are used to determine whether an exceedance has occurred. *Id.* at 260-264; see p. 6, *supra*.

Here, undisputed monitoring evidence demonstrated that exceedances of water-quality standards were detected at the mass-emissions monitoring stations for the rivers. The district court and court of appeals agreed that the evidence established a violation of the permit at issue, specifically Part 2.1. See Pet. App. 27-40, 114-117. Petitioner does not appear to challenge that determination in this Court.

2. Both of the courts below believed that proof of pollutant exceedances at an MS4 monitoring station was not sufficient, in and of itself, to establish petitioner's liability for a permit violation. They believed that respondents were required in addition to connect the measured exceedances to petitioner's MS4 outfalls in order to show that petitioner had caused or contributed to the violation. Pet. App. 40, 121. In the course of holding that respondents had met their burden as to that factbound inquiry, the court of appeals stated: "As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River." *Id.* at 44.

Petitioner argues that this sentence makes broad, unprecedented pronouncements of law. Read in context, however, the sentence reflects the court's factual understanding regarding the structure of the MS4 and the location of the monitoring stations. The court was not addressing the legal questions now presented by petitioner: (1) whether man-made improvements to a water body alter its status as a water of the United States, and (2) whether transfers of polluted water within a single water body constitute pollutant discharges under the CWA. Indeed, the parties never disagreed below about the proper resolution of either of those questions.

The court of appeals' opinion indicates that it thought the monitoring stations at issue were located in a portion of the MS4 distinct from the rivers themselves. Pet. App. 44 ("the MS4 is distinct from the two navigable rivers"); see, *e.g.*, *id.* at 5 ("the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by [petitioner], and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers"); *id.* at 18 ("The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by [petitioner]"); *id.* at 49 ("the Monitoring Stations for these two rivers are located in a portion of the MS4 owned and operated by [petitioner]"); see also C.A. Pet. for Reh'g 2 ("*[C]ontrary to the Court's conclusion*, [petitioner's] MS4 and the Los Angeles and San Gabriel Rivers downstream from each [mass-emissions monitoring station] are one and the same.") (emphasis added). As both petitioner and respondents point out (Pet. 26; Br. in Opp. 6), however, the portions of the MS4 that

contain the relevant monitoring stations actually lie within with the Los Angeles and San Gabriel Rivers.

The court of appeals was thus mistaken to the extent it determined that polluted stormwater flowing through the monitoring stations was *later* discharged from the MS4 into the rivers. Rather, the pollutants passing through the stations already had been discharged into the rivers from upstream MS4 outfalls. By itself, however, that sort of factual mistake does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

3. Petitioner's amici suggest that the court of appeals' decision has broad ramifications for regulation of ms4s generally. See League of Cal. Cities & Cal. State Ass'n of Counties Br. 2-3. But the decision below is tied to the specific terms of petitioner's NPDES permit—in particular, its distinctive monitoring scheme—and to the unique structure of the MS4 in Los Angeles County. Amici have not argued that they are regulated by similarly worded permits with similar monitoring regimes in similar geographic settings. Amici also conflate the determination whether a permit is required—*i.e.*, whether an ms4 discharges pollutants to waters of the United States—with the determination whether an existing permit has been violated in particular factual circumstances. See *id.* at 4-5.

Moreover, the Regional Board is currently considering renewal of the MS4 permit at issue here. See Los Angeles Regional Water Quality Control Board, *Storm Water—Municipal Permits*, http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/index.shtml (last visited May 22, 2012). As part of that process, petitioner presumably will have an

opportunity to propose a different monitoring protocol or, if it chooses, to challenge the new permit's monitoring protocol in state court (see p. 5, *supra*). Accordingly, the permit terms giving rise to the violation in this case might well be amended in the near future. Because the question before the court of appeals concerned the evidentiary showing needed to establish a violation of a particular ms4 permit, the prospect of revisions to the governing permit further reduces the continuing importance of the court's decision.

B. No Conflict Exists Between The Decision Below And Decisions Holding That Man-made Water Bodies Can Be Waters Of The United States

1. Petitioner asserts (Pet. 19-21, 27-38) that, under the court of appeals' decision, only "naturally occurring" waters can be "waters of the United States" within the meaning of the CWA. On that reading of the court's opinion, man-made improvements deprive a water body (or the altered portion of it) of its status as part of the "waters of the United States," so that pollutants can be discharged into the improved water body without potential liability under the CWA. Petitioner further asserts that review by this Court is warranted to resolve a conflict between the ruling below and prior decisions recognizing that "waters of the United States" may include man-made or improved waters.[5] The alleged conflict is

[5] See Pet. 32-38 (citing, *e.g.*, *Rapanos* v. *United States*, 547 U.S. 715 (2006); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172-173 (1979); *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940); *United States* v. *Eidson*, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 and 522 U.S. 1004 (1997), overruled on other grounds, *United States* v. *Robison*, 505 F.3d 1208, 1215 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); *Headwaters* v. *Talent Irrigation Dist.*, 243

illusory, however, because the court of appeals did not endorse the broad (and manifestly erroneous) proposition that petitioner attributes to it.

The court of appeals recognized that the Los Angeles and San Gabriel Rivers are waters of the United States in their entirety (Pet. App. 42), and none of the parties ever contended otherwise. Petitioner's reading of the court of appeals' opinion is based on the same single statement discussed above (see p. 13, *supra*): "As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River." Pet. App. 44. Contrary to petitioner's contention, that statement should not be read in isolation as embracing the sweeping proposition that improving or channelizing a portion of the watershed rivers deprives them of their status as navigable waters.

The MS4 as a whole is reasonably characterized as a "man-made construction," and substantial portions of it are located outside of any "naturally occurring Watershed River." Pet. App. 44; see *id.* at 106 (explaining that "[t]he MS4 is a complicated web, with thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections"). To be sure, the MS4 also includes portions of the rivers into which the stormwater ultimately flows. Br. in Opp. 6. But, as explained above (pp. 13-15, *supra*), the court of appeals appears to have decided the case on the mistaken understanding that the relevant mass-emissions stations were located in the MS4 at a point *before* the MS4 became coextensive with the rivers. The statement on which

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F.3d 526 (9th Cir. 2001); *United States* v. *Moses*, 496 F.3d 984 (9th Cir. 2007), cert. denied, 554 U.S. 918 (2008)).

petitioner relies is more naturally read to reflect the complexity of the MS4 (a massive network neither wholly within nor wholly outside the preexisting rivers), coupled with the court's apparent mistake as to the precise locations of the relevant monitoring stations, rather than as a broad (and clearly wrong) legal holding that man-made or man-altered water bodies cannot be "waters of the United States."[6]

2. If the court of appeals had held that the CWA's coverage is limited to non-altered or "natural" waters, its decision would significantly curtail the government's regulatory authority and would conflict with agency interpretations of the Act. EPA and U.S. Army Corps of Engineers regulations defining "waters of the United States" do not distinguish between "natural" and "man-made" waters (except to exclude explicitly waste treatment systems designed to meet CWA requirements). 40 C.F.R. 122.2; 33 C.F.R. 328.3(a). And if a court of appeals ever relies on the decision below to hold that pollutant discharges into man-made or improved water bodies are not subject to the CWA's restrictions, its decision may warrant review by this Court. The decision below, however, does not clearly endorse that proposition; the opinion is readily susceptible of an alternative

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[6] Petitioner contends that the court of appeals must have understood that the monitoring stations sit in the rivers because the court cited a Los Angeles County Department of Public Works website (not in the record) that purportedly clarifies that fact. Pet. Reply Br. 2-3 (citing Pet. App. 18 n.4). But the opinion as a whole shows that the court of appeals struggled with understanding the "complicated drainage system" of the MS4. Pet. App. 47. Indeed, one of petitioner's amici appears to share the court's mistaken understanding that the mass-emissions stations were located not in the San Gabriel and Los Angeles Rivers, but in the MS4 *before* it discharged into the receiving waters. See Florida Stormwater Ass'n Br. 7-8.

reading; and the government views it as unlikely that the decision will be interpreted and applied in the broad manner petitioner suggests.

If the court of appeals *had* adopted a restrictive reading of the CWA term "waters of the United States," the natural effect of its holding would be to *reduce* the range of activities that are regulated under the Act. Petitioner's ultimate complaint in this case, however, is that the court of appeals found a CWA violation where (in petitioner's view) no violation actually occurred. Petitioner thus posits not simply an aberrant reading of the term "waters of the United States," but a convoluted chain of reasoning through which the Ninth Circuit's unduly narrow view of CWA coverage led the court to adopt an unduly broad view of petitioner's obligations under the MS4 permit. The anomalous nature of that argument provides a further reason for this Court to deny review.

C. No Conflict Exists Between The Decision Below And This Court's Decision In *Miccosuksee*

Petitioner also asserts (Pet. 38-42) that the court of appeals' decision conflicts with this Court's holding in *Miccosukee* that pumping water between two parts of the same water body does not constitute a discharge of pollutants under the CWA. See 541 U.S. at 109-110. Petitioner appears (*e.g.*, Pet. 15, 39) to base that argument on the court of appeals' statement that the relevant discharges occurred when polluted stormwater flowed out of "concrete channels" where the MS4 monitoring stations are located and into the Los Angeles and San Gabriel Rivers. See Pet. App. 45, 47. Because the parties agree that the monitoring stations were actually located within the rivers themselves (see p. 14, *supra*),

petitioner construes the court of appeals' opinion as holding, *sub silentio*, that a "discharge" of pollutants occurs when polluted water flows from a channelized portion of a river into a lower portion of the same river.

If the court of appeals had endorsed the proposition that petitioner attributes to it, the court's holding would conflict with *Miccosukee*. Essentially for the reasons set forth above (pp. 13-15, *supra*), however, the sounder inference is that the court of appeals believed that the part of the MS4 in which the monitoring stations sit is distinct from the rivers. If the court's decision was premised on that understanding of the relevant facts, its references to pollutant discharges from the MS4 to the Los Angeles and San Gabriel Rivers are fully consistent with *Miccosukee*.[7]

Unlike in *Miccosukee*, moreover, where the question was whether any discharge of a pollutant requiring an NPDES permit had occurred, petitioner undisputedly discharges pollutants into waters of the United States. Petitioner is an operator of an ms4 serving a population of more than 250,000 that discharges stormwater through hundreds of outfalls into the Los Angeles and San Gabriel Rivers. Pet. App. 106. The question here is not whether petitioner's activities required an NPDES

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[7] If this Court grants certiorari to consider the questions presented in the petition, it may wish to appoint an amicus curiae to defend the propositions of law that petitioner attributes to the court of appeals. Respondents have not argued that man-made or "improved" water bodies categorically fall outside the CWA's coverage, or that a transfer of polluted water between two parts of the same water body is a "discharge" of pollutants within the meaning of the Act; and there is no reason to suppose that respondents will advocate either of those positions in their merits brief if the Court grants certiorari.

permit, but whether petitioner was properly held liable for violations of the particular NPDES permit at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES
DEFENSE COUNCIL, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA STORMWATER QUALITY ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The California Stormwater Quality Association (CASQA) respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTERESTS OF THE *AMICUS CURIAE*

CASQA is a nonprofit corporation with approximately 2,000 members, including hundreds of local public agencies. Almost 300 CASQA members hold national pollutant discharge elimination system (NPDES) permits that regulate the municipal services function of discharge of stormwater to navigable waters, and 14 of the 300 are flood control districts that have similar circumstances as the Petitioner. CASQA members stand to suffer from the Ninth Circuit's finding that the Petitioner's improvements to waters like the Los Angeles and San Gabriel Rivers converted those waterways, or parts of them, to a point source discharge to navigable waters. Further, the Ninth Circuit's opinion has created substantial regulatory uncertainty for CASQA's members with

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made monetary contributions intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

respect to what is now considered to be, or not be, a navigable water under the Clean Water Act (CWA), and whether other CWA regulatory requirements apply to waterways improved through portions of their reach.

CASQA is the largest professional association dedicated to stormwater quality issues in California. CASQA's membership includes a diverse range of governmental and non-governmental entities throughout the state that discharge under NPDES stormwater permits, one of which is the Petitioner. CASQA members also include professionals, businesses, trade associations, and others that do not themselves hold NPDES stormwater permits, but have an interest in managing stormwater quality.

CASQA's primary purpose is to assist regulators, municipalities, and others in implementing NPDES stormwater requirements. CASQA: recommends objectives and procedures for stormwater discharge control programs that are technically and economically feasible; promotes the need for significant environmental benefits and protection of water resources; promotes technological advancements; and promotes compliance with state and federal laws, regulations, and policies. CASQA also engages experts to help assess and understand the impacts of proposed changes to laws and regulations governing stormwater management. CASQA believes that balancing human and environmental quality of life with costs is a necessary component of improving water quality through NPDES permitting and other regulatory strategies.

CASQA has a statewide perspective on the importance of municipal separate sewer systems (MS4s) and their interaction with navigable waters under the CWA. CASQA also understands and is experiencing the broad regulatory confusion created by the Ninth Circuit's ruling, which conflicts with its own relevant decisions as well as decisions of this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's conclusion that concrete-improved portions of the Los Angeles and San Gabriel Rivers are point source discharges to navigable waters creates instant liability for those entities that own or operate the facilities in the improved channels. It also expands regulatory jurisdiction, creates confusion with respect to the definition and scope of navigable water under the CWA, and related, results in a patchwork approach to identifying any regulating discharges to navigable waters or segments. In reaching its conclusion that the concrete portions of these two rivers are point source discharges, the Ninth Circuit bypassed this Court's jurisprudence as well as its own.

1. The Ninth Circuit's findings contradict themselves, other Ninth Circuit decisions, and the decisions of this Court. Specifically; the Ninth Circuit found that the "Watershed Rivers," including the Los Angeles and San Gabriel Rivers, were navigable waters. *NRDC v. County of Los Angeles*, No.

10-56017, 2011 U.S. App. LEXIS 14443, at *49 (9th Cir. 2011) (*NRDC*). But the court then found that the "MS4," as a matter of law and fact, was distinct from the two navigable rivers because it was "an intra-state man-made construction – not a naturally occurring watershed river." *Id.* at **52-53. To find this distinction, the court appears to rely primarily on the fact that portions of the Los Angeles and San Gabriel Rivers are now "concrete portions of the MS4 controlled by the District," and that the discharge occurred when stormwater flowed out of the concrete channels into navigable waters. *Id.* at **53, 56. In other words, the concrete portions of the rivers are MS4s – not navigable waters. Notably, the Ninth Circuit failed to first determine if the concrete portions of the Los Angeles and San Gabriel Rivers are in fact navigable waters under the CWA regardless of the Petitioner's improvements. Instead, the Ninth Circuit made a sweeping conclusion that concrete improvements to the Los Angeles and San Gabriel Rivers changed the character of these channels from navigable waters to point source discharges. The Ninth Circuit's failure to engage in this analysis calls into question what constitutes a navigable water, and conflicts with this Court's guidance in *Rapanos v. United States*, 547 U.S. 715 (2006).

2. The Ninth Circuit's decision leaves MS4 permittees and others in the untenable position of not knowing whether a water previously considered a navigable water under the CWA (i.e., waters of the United States) is in fact not a navigable water

because of a given degree of man-made improvements. This uncertainty calls into question the application of statutory and regulatory requirements that are triggered when a water is considered to be a navigable water under the CWA. More importantly, the transformation of previously considered navigable waters to point sources (due to man-made improvements) shifts liability and responsibility for meeting the goals of the CWA from all "dischargers of pollutants" that contribute pollutants to segments in question to the entity that controls the newly defined point source in the river channel. This artificially created liability undermines the water quality standards provisions in the CWA.

The primary purpose and goal of the CWA is to restore and maintain the integrity of the nation's waters. 33 U.S.C. § 1251(a). To accomplish this goal, the CWA regulates point source discharges to navigable waters. 33 U.S.C. § 1342. Municipal stormwater dischargers are subject to the CWA's NPDES requirements. 33 U.S.C. § 1342(p). The CWA includes other mechanisms such as the adoption and implementation of water quality standards to meet the purpose and goal of the CWA. 33 U.S.C. § 1313(c). Compliance with water quality standards applies to both point sources of pollution and nonpoint sources of pollution. 33 U.S.C. § 1313; see generally *Pronsolino v. Nastri*, 291 F.3d 1123, 1132-1133 (9th Cir. 2002).[2] Further,

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[2] The term "point source" is defined in the CWA at 33 U.S.C. § 1362(14). The term "nonpoint source" is not specifically

(Continued on following page)

municipal stormwater dischargers are also subject to regulation under other CWA provisions applicable to discharges to navigable waters, including total maximum daily load (TMDL) and dredge and fill material permit requirements. 33 U.S.C. §§ 1313(d)(1), 1344.

In California, the water quality standards, TMDL, and dredge and fill material requirements have been, and are, applied to concrete-improved portions of waters because the state, U.S. Army Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) have considered these waters to be navigable waters under the definitions contained in the CWA, its implementing regulations and through the tests set forth by this Court in its previous decisions. However, the Ninth Circuit's decision questions the applicability of these CWA requirements as currently being applied to concrete-improved portions of waters because the court's decision has transformed these concrete-improved waters from being navigable waters to point source discharges.

Review by this Court is needed to provide NPDES permittees, regulatory agencies, and others with certainty as to what constitutes a navigable

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defined by the CWA but is considered to mean "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Northwest Envt'l Defense Center v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) citing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

water under the CWA if the waterbody in question has been improved or altered for flood protection, or for other purposes. Moreover, review by this Court is necessary to maintain the integrity of the CWA's water quality standards provisions, including TMDLs (which are designed to ensure that all sources of pollution to navigable waters are held proportionally responsible for attaining the nation's water quality goals). Specifically, if left unchanged, the Ninth Circuit's decision means that as long as there is some concrete improvement, those point or nonpoint sources of pollution that discharge into the "point source" would no longer be responsible for their contributions that cause or contribute to problems in the nation's waters.

ARGUMENT

I. The Ninth Circuit Failed to Make the Necessary Threshold Determination as to Whether the Concrete-Improved Portions of the Los Angeles and San Gabriel Rivers Are In Fact Navigable Waters as Defined By the CWA

CWA jurisdiction covers "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Both the Corps and EPA have defined waters of the United States in regulations. 33 C.F.R. § 328.3 (Corps Regulations); 40 C.F.R. § 122.2 (EPA's Regulations). The definitions include, in part, "all interstate waters

. . . ; all other waters such as intrastate lakes, rivers, streams . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. . . . [t]ributaries of such waters." 40 C.F.R. § 122.2, *Waters of the U.S.* (b), (c) and (e). The meaning of waters of the United States, and the application of the regulatory definitions, has been the subject of several decisions by this Court. *Rapanos*, 547 U.S. 715; *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The term "point source" is defined by the CWA as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). A navigable water cannot be both a point source and a navigable water. See *Rapanos*, 547 U.S. at 735 ("The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping.").

In the decision below, the Ninth Circuit departed from this Court's rulings with respect to the definition of a water of the United States. In the *Rapanos* case, the plurality and Justice Kennedy's concurring opinion each established a standard for determining what constituted a navigable water, or water of the United States. The plurality found that the phrase

"waters of the United States" included "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739. The plurality further declared that "waters of the United States" includes streams that "contain continuous flow during some months of the year but no flow during dry months," but not streams whose flow is "coming and going at intervals," "broken, fitful," or "existing only, or no longer than, a day." *Id.* at 732 n.5. In his concurring opinion, Justice Kennedy articulated the standard for whether a wetland is jurisdictional to be a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in judgment). He further stated that wetlands possessed the "requisite nexus," and thus came within the meaning of navigable waters "if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in judgment).

Under either standard, the presence of man-made improvements was not considered to transform what otherwise would be considered a navigable water to a point source discharge. In fact, Justice Kennedy uses the Los Angeles River as an example of an impermanent stream that reasonably should

be included as a navigable water under the CWA. *Rapanos*, 547 U.S. at 769-770.

The Ninth Circuit also failed to follow its own jurisprudence when it found the concrete-improved portions of the Los Angeles and San Gabriel Rivers to be point sources instead of navigable waters. For example, the Ninth Circuit has found that man-made irrigation ditches can constitute a water of the United States when they were tributary to other navigable waters. *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) "As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirements."

More recently, the Ninth Circuit found that in *Rapanos* "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007). It also rejected the argument that modification to a stream that is a navigable water destroyed its legal character. Specifically, the Ninth Circuit considered whether a portion of Teton Creek was a water of the United States. *Id.* at 988-991. The portion of Teton Creek in question only maintained flows for two months during spring runoff because of an irrigation diversion structure upstream. *Id.* at 985. The Ninth Circuit noted that is unlikely that a "mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *Id.* at 989. In other words, the Ninth Circuit found that

man-made changes or improvements to the waterway did not change its character as navigable under the CWA. The Ninth Circuit also answered the question, if a "seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States[?]" *Id.* at 989. Answering in the affirmative, and relying on its previous decision in *Headwaters, Inc. v. Talent Irrigation District* that "even tributaries that flow intermittently are 'waters of the United States'" (*Moses*, 496 F.3d at 989), the Ninth Circuit specifically found as follows: " . . . Teton Creek constitutes a water of the United States and, as the Supreme Court has recognized, regardless of any other disagreements, 'no one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels.'" *Id.* at 991, internal citations omitted.

As described by Justice Kennedy in *Rapanos*, the Los Angeles River factually resembles Teton Creek. "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. Yet it periodically releases water volumes so powerful and destructive that is has been incased in concrete and steel over a length of some 50 miles." *Rapanos*, 547 U.S. at 769. Despite the factual similarities between the Los Angeles River and Teton Creek, the Ninth Circuit has found one to be a water of the United States and the other to be a point source discharge. The Ninth

Circuit's holdings in *Moses* and in this case cannot be reconciled.

In light of the inconsistency with applicable precedent, this Court must grant review to ensure consistency and uniformity with respect to determination of what constitutes a water of the United States. Further, because a point source and navigable waters under the CWA are necessarily distinct, the Ninth Circuit's decision raises practical application issues that cannot be reconciled with the Ninth Circuit's decision here and with other decisions.

II. If Left Uncorrected, the Ninth Circuit's Decision Creates Confusion and Regulatory Uncertainty, and Shifts Responsibility for Meeting Water Quality Standards From All Responsible Dischargers to the Owner/Operator of the Newly Described Point Source

Further review is also warranted because the Ninth Circuit's decision engenders confusion for federal and state appellate courts, the EPA, the Corps, delegated states, and both point and nonpoint source dischargers. Most notably, the CWA requires that waters of the United States be protected with water quality standards. 33 U.S.C. § 1313. In general, water quality standards consist of "designated uses of the navigable waters involved and the water quality criteria for such waters based upon the uses." 33 U.S.C. § 1313(c)(2)(A). "The states are required to set water quality standards for *all* waters within their

boundaries regardless of the sources of pollution entering the waters. If a state does not set water quality standards, or the EPA determines that the state's standards do not meet the requirements of the Act, the EPA promulgates standards for the state. 33 U.S.C. §§ 303(b), (c)(3)-(4)." *Pronsolino*, 291 F.3d at 1127, *cert. denied*, *Pronsolino v. Nastri*, 539 U.S. 926 (2003). EPA defines water quality standards to mean "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. §§ 130.2(d), 131.3(i).

The CWA further requires that when imposition of certain effluent limitations on point sources are not sufficient to implement water quality standards applicable to such waters, states must establish a priority ranking of such waters not meeting applicable standards. 33 U.S.C. § 1313(d)(1)(A); see generally *Pronsolino*, 291 F.3d at 1136. The state's ranking is often referred to as the "303(d)" list or List of Water Quality Limited Segments.[3] For those waters identified on the List of Water Quality Limited Segments, states must establish "the total maximum daily load,

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[3] The term *Water Quality Limited Segment* is from the EPA's regulations, which defines *water quality limited segment* as "[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.2(j).

for those pollutants which the Administrator identifies . . . as suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C). TMDLs are an essential component in the CWA because they "serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters." *Pronsolino*, 291 F.3d at 1129. Both the List of Water Quality Limited Segments and state-established TMDLs require EPA approval. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d).

In California, EPA most recently approved the state's 2010 California 303(d) List of Water Quality Limited Segments.[4] Six reaches of the Los Angeles River and three reaches of the San Gabriel River are included on the list. California State Water Resources Control Board, Final 2010 Integrated Report (CWA Section 303(d) List/305(b) Report), *Category 5, 2010 California 303(d) List of Water Quality Limited Segments* (Aug. 4, 2010), http://www.waterboards.ca.

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[4] See generally, Letter to Tom Howard, Executive Director of the State Water Resources Control Board, from Alexis Strauss, Director, Water Division, U.S. EPA Region XI (Oct. 11, 2011), http://www.waterboards.ca.gov/water_issues/programs/tmdl/records/state_board/2011/ref3641.pdf, and Letter to Tom Howard, Executive Director of the State Water Resources Control Board, from Alexis Strauss, Director, Water Division, U.S. EPA Region XI (Nov. 12, 2010), http://www.waterboards.ca.gov/water_issues/programs/tmdl/records/state_board/2010/ref3640.pdf.

gov/water_issues/programs/tmdl/2010state_ir_reports/category5_report.shtml, **134-135, 147-148 (2010 Limited Segments Report). Combined, the six reaches of the Los Angeles River alone total over 42 miles and include various reaches where water quality standards are not attained for pollutants ranging from ammonia to zinc. *Id.* at **134-135. The listings for the Los Angeles and San Gabriel Rivers would not exist but for the fact that both are considered to be waters of the United States, have applicable water quality standards, and that such water quality standards are not being met. In other words, the Los Angeles and San Gabriel Rivers are considered to be waters of the United States for the application of water quality standards and the development of TMDLs by both the state and the EPA. However, in the decision below, the Ninth Circuit has now declared that the concrete-improved portions of these rivers are in actuality point source discharges. *NRDC*, 2011 U.S. App. LEXIS 14443 at *52.

With this finding, the Ninth Circuit would make the owner/operator of the concrete improvements in a portion of the channel responsible for any and all pollutants that enter or pass through this portion of the river – regardless of its original source. *NRDC*, 2011 U.S. App. LEXIS 14443 at **53-54. By making one entity responsible, those that contribute pollutants to the newly defined point source are no longer responsible for controlling their discharges.

Further, the Ninth Circuit's decision creates an odd patchwork of navigable waters and point sources

within the same waterway. For example, a single water may have "naturally-occurring" portions as well as portions that have been improved or altered with man-made features. Such portions may be interspersed throughout the length of the water. Under the Ninth Circuit's ruling, the portions with man-made improvements are now point source discharges while the "naturally-occurring" portions are navigable waters. Water quality standards would apply only to the naturally-occurring portions. This fragmented application of water quality standards undermines their primary purposes, which are "to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. . . ." 33 U.S.C. § 1313(c)(2)(A). More importantly, where water quality standards are not met, states must adopt TMDLs. By definition, TMDLs allocate responsibility between point sources, nonpoint sources, and natural background. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i). Under the Ninth Circuit's decision, TMDLs are irrelevant where there are interspersed "point sources" that are now responsible for pollutants being directly added to, or "channeled" through, the concrete-improved or man-made facilities.

The Los Angeles and San Gabriel Rivers are not unique. There are many other waters in California and throughout the nation that have been improved with concrete or otherwise for flood control protection and other purposes. For example, in Riverside County there is the Chino Creek Reach 2, which is described as the concrete channel to confluence with

San Antonio Creek, and in Orange County there is Laguna Canyon Channel.[5] Both waters are included on the state's EPA-approved 2010 List of Water Quality Limited Segments for not meeting certain water quality standards. 2010 Limited Segments Report at **219, 231. Under the Ninth Circuit's decision below, the improved portions of these waters would no longer be considered waters of the United States, and water quality standards would no longer apply.

Besides affecting the application of water quality standards, the Ninth Circuit's decision also clouds the law as to when a person or agency must obtain a dredge and fill permit under section 404 of the CWA. 33 U.S.C. § 1344(a). Municipalities, flood control districts, and others occasionally find it necessary to work within the concrete-improved portions of these waters. Depending on the activity, these entities often find it necessary to first obtain dredge and fill permits from the Corps. With the Ninth Circuit's decisions, these same agencies, including the Corps, are now left with an uncertainty as to whether such permits are required. This uncertainty not only creates a regulatory vacuum, but may expose these entities to potential fines and criminal sanctions should they not obtain a dredge and fill permit, but later the Corps or a court determines that the concrete-improved portion of the waters is a water of the

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[5] 2010 Limited Segments Report at **219, 231.

United States under the Ninth Circuit's other decisions.

Because of the Ninth Circuit's decision, those regulated under the CWA who are now regulated with respect to discharges to concrete-improved sections of streams (i.e., are required to ensure the protection of water quality standards or obtain dredge and fill permits) are in regulatory limbo. Case-by-case litigation through the appellate level for each water is the only method available for actually determining what the court below may consider to be a water of the United States, and where and how regulated parties must ultimately allocate resources for compliance. Unfortunately, the Ninth Circuit decisions collectively provide no consistent test or standard for lower courts and others to rely upon. Moreover, the Ninth Circuit's decision causes entities that own or operate concrete-improved or man-made facilities that are located in navigable waters to take on responsibility for ensuring compliance with downstream water quality standards even though the sources of pollution may be broad and wide. Making a single entity responsible for the contributions of many is inconsistent with the CWA, and does not ensure that the nation's waters will be protected.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and SANTA MONICA BAYKEEPER,
Respondents.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

BRIEF AMICUS CURIAE OF THE FLORIDA STORMWATER ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amicus will address the following questions:

1. Can stormwater that exceeds either water quality criteria or water quality standards when sampled at a mass emissions sampling point located in a municipal separate stormwater sewer system constitute a violation of the Clean Water Act's prohibition on the discharge of a pollutant from a point source?

2. Does the Ninth Circuit's holding that stormwater exceeding either water quality criteria or water quality standards when sampled at a mass emissions sampling point located in a municipal separate stormwater sewer system constitute a significant and intolerable burden on the operators of municipal separate stormwater sewer systems nationwide?

3. Is a co-permittee of a municipal separate stormwater sewer system permit responsible as a matter of law under the Clean Water Act or its permit for permit violations arising from the combined discharges of its co-permittees?

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INTERESTS OF THE AMICUS CURIAE[1]

The Florida Stormwater Association (FSA) was organized in 1993 as the Florida Association of Stormwater Utilities (FASU). FASU was created to promote greater awareness of stormwater utilities and to improve the operational capacities of the stormwater utilities already in existence. Over time, FASU became more involved with general stormwater management throughout Florida. In June 2001, the organization was renamed the Florida Stormwater Association, a not-for-profit Florida corporation. One of FSA's primary mission has been to monitor and become actively involved in the decision-making processes of the state and federal regulatory agencies and to disseminate information about stormwater, stormwater management, flooding, and water quality.

FSA has grown to be a 300 member association consisting of city and county governments, consulting and engineering firms, academic institutions and various special districts created under Florida law that have an interest in stormwater management and infrastructure finance in Florida. All of FSA's city and county members discharge to surface waters in the State

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[1] Under Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Counsel of record for all parties received timely notice of the intent to file the brief under Rule 37.2(a), and letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

of Florida. These discharges are regulated by the Florida Department of Environmental Protection (FDEP) through a delegation of authority from the United States Environmental Protection Agency (USEPA). All of FSA's government members are subject to regulation as part of a municipal separate stormwater sewer system (MS4).

FSA has a direct interest in the outcome of this case. Many of FSA's members own or operate municipal separate stormwater sewer systems throughout Florida. The Court of Appeals' unprecedented interpretation of the Clean Water Act (CWA) in this case sets a precedent that directly contravenes key operative provisions of existing MS4 stormwater permits issued by FDEP. Moreover, allowing a citizen suit action against a single permittee for exceeding mass emissions limitations for pollutants measured at a monitoring point turns established stormwater permit compliance programs across the nation on their heads.

As a result, this amicus strongly urges this Court to grant certiorari to review the Ninth Circuit's erroneous and misguided interpretation of the CWA. FSA's experiences with the stormwater permitting program in Florida under the CWA and its insight on the serious and severe problems that the Court's interpretation will cause will be helpful to this Court in its disposition of this matter.

SUMMARY OF THE ARGUMENT

The Ninth Circuit radically departed from existing case law by its interpretation of what constitutes a "discharge" from a "point source" under the Clean Water Act (CWA) as those terms apply to stormwater discharges from municipal separate storm sewer systems (MS4s).

1. The Ninth Circuit held that a co-permittee of a MS4 permit issued under the Clean Water Act is responsible for civil penalties for violations and for pollution reduction in combined discharges of its co-permittees. This holding is erroneous as a matter of law.

2. The Ninth Circuit's decision that exceedances of water quality criteria at a mass emissions sampling station are sufficient to state a violation of the CWA erroneously rejects the "iterative process" in the MS4 permit that is the mechanism for compliance.

3. The Ninth Circuit's decision negates the established structure of MS4 permits in place across the country, including Florida, that do not consider such exceedances to be violations of the permit, thereby creating a significant and intolerable burden on operators of MS4s.

4. The Ninth Circuit's decision creates uncertainty in the regulated community nationwide due to the significantly different approaches to compliance set forth by EPA and the Ninth Circuit. The decision creates two disparate MS4 permitting systems as evidenced by a MS4 permit from Lee County, Florida.

ARGUMENT

I. WHETHER THE NINTH CIRCUIT'S ERRONEOUS CONSTRUCTION OF THE CLEAN WATER ACT'S "DISCHARGE" FROM "A POINT SOURCE" IMPOSES A SIGNIFICANT AND INTOLERABLE BURDEN ON OPERATORS OF MUNICIPAL SEPARATE STORMWATER SEWER SYSTEMS (MS4s) NATIONWIDE

A. Single Permittee of a MS4 is not legally responsible for combined discharges of its Co-Permittees.

1. The Ninth Circuit determined that a single Permittee is responsible for systemwide discharges to a MS4 as a matter of law.

The federal regulatory scheme under the Clean Water Act (CWA), 33 U.S.C. §1251 et seq., for stormwater discharges is unparalleled in environmental law for scope of coverage area, types of pollutants and sheer volume of water at issue as a result of water draining large urban areas and flowing into receiving waters. The CWA generally prohibits the discharge of any pollutant from a point source into the navigable

waters of the United States unless the point source is regulated by a NPDES permit. Defenders of Wildlife v. Brunner, 191 F.3d 1159 (9th Cir. 1999) (quoting 33 U.S.C. § 1311(a) 1362 (12)(A)). The NDPES stormwater permit at issue in the Petition and this amicus brief was issued by the Los Angeles Regional Water Quality Control Board to the County of Los Angeles, the Los Angeles Flood Control District (District) and eighty-four (84) incorporated municipalities (Permittees or Co-Permittees) in Los Angeles County (Permit). The Ninth Circuit interpreted this Permit and made significant new law with national implications for MS4s. Natural Resources Defense Council Inc. v. County of Los Angeles, No. 10-56017, 2011 WL 2712963 (9th Cir. 2011) (NRDC or Opinion). Understanding the impact of the new law on MS4s across the country requires background information on the facts.

The 3,100 square miles of territory covered by this MS4 Permit is home to more than 10 million people. To provide perspective on the size of the Permit, both the States of Delaware (2,489 square miles) and Rhode Island (1,545 square miles) are smaller. It is undisputed that when it rains, the territory encompassing the MS4 generates rainwater runoff from across the County of Los Angeles. NRDC, 2011 WL 2712963, at *2. As the runoff flows across the land and into various collection channels, ditches and conveyance, it picks up a myriad of different types of pollutants. These pollutants include oils, greases and antifreeze from road surfaces. They include excess

fertilizers that wash over lawns, public rights of way and golf courses. These variable stormwater discharges originate from sources within each Permittee's territory and are transmitted through ditches, culverts and other devices that co-mingle the waters as they flow into the receiving body of water. Prior to the exit of this combined stormwater flow from the MS4, it is also undisputed that the flow contains pollutants at varying concentrations. This scenario is repeated across the country in urban and nonurban areas alike. For stormwater pollution, the whole is truly the sum of its parts.

At issue before the Ninth Circuit in NRDC were certain stormwater flows that exceeded numerical criteria for mass loading of pollutants. The pollutants were detected at two monitoring stations located within the conveyance system of the MS4. Waters in that conveyance system, along with pollutants in those waters, flowed downstream into the waters of two watersheds – the Los Angeles and the San Gabriel Rivers. The Ninth Circuit more precisely determined that "...the Monitoring Stations for these two rivers [Los Angeles River and San Gabriel River] are located ***in a portion of the MS4 owned and operated by the District.***" (emphasis added.) NRDC, 2011 WL 2712963, at *19. In addition, the "...Monitoring Stations detected pollutants in excess of the amount authorized by the NPDES permit [water quality criteria and water quality standards], and ...this polluted water "discharged"

into the Los Angeles River and San Gabriel River." Id.

This determination was sufficient for the Ninth Circuit to find a violation of the CWA. It meant that the violations of the CWA occurred not in the rivers or other waters receiving flow from the MS4, but at a monitoring point physically located in a concrete MS4 conveyance structure owned by the District. Because of its physical ownership of this conveyance structure, the District became responsible for control of the stormwater flowing through its conveyance, and logically, for the reduction of pollutants in that stormwater flow mandated by the Permit.

This determination also means that exceedances at the conveyance structures become the basis for civil penalties assessed against the District for each occurrence and the non-compliance can be enforced in a citizens' suit enforcement action against the District, which is precisely the procedural posture of this case. It also follows that a citizen's suit can be prosecuted for any future exceedance ad infinitum until compliance with numerical criteria is achieved.

Ironically, in 2004 the California Court of Appeals found it was "speculation" that citizens groups would "race to the courthouse" to file lawsuits against municipalities and seek penalties for violations of water quality standards after that court held that California regulators could require

MS4s to comply with water quality standards. Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal App. 4th 866, 22 Cal. Rptr. 3d 128, (2004). This case was proof that it is no longer speculation that citizens' suits will be filed. This Ninth Circuit decision provides a green light for citizen groups to race to the courthouse to file against the District or any other MS4 permittee.

To establish this new law, the Court of Appeals focused on establishing the CWA's well-established requirement that a "discharge" from a "point source" occurred. The discharge from a point source occurred "when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." NRDC, 2011 WL 2712963, at 17*. To conclude that such a discharge had occurred, the Opinion crafted a convoluted "navigable waters" analysis that has been challenged by the Petitioner in its Petition for Writ of Certiorari. Petitioner's legal objections to the Court's navigable waters analysis will not be repeated here. Instead, the purpose of this amicus brief is to focus the Court on the impact of the Ninth Circuit's contorted construction on MS4 permittees nationwide and how the Ninth Circuit's legal contortion turns stormwater management programs on its head, calling into question key operative provisions of MS4 permits in force across the country.

2. The Permit Terms And The Regulations Fail To Support The Conclusion That The District Is Responsible As A Matter Of Law

The plain reading of the Permit's terms, coupled with the USEPA regulations for stormwater permits do not authorize shared responsibility among co-permittees to a MS4 permit. "Each Permittee is responsible only for discharge for which it is the operator." (Excerpt of Record, "ER" 199, California State Water Resources Control Board for the Los Angeles Region NPDES Permit ¶ G.4) (2007). Even as the principal permittee for the MS4, the District was nonetheless "not responsible for ensuring compliance of any individual Permittee." ER 204, California State Water Resources Control Board for the Los Angeles Region NPDES Permit Part 3, D 1. (2007)[2]. These terms in the Permit track closely with USEPA regulations defining a co-permittee as an entity that is "only responsible for the conditions related to the discharge for which it is the operator." 40 C.F.R. §122.26 (b)(1)(2011) For an appellate decision to hold otherwise makes the permittee chosen as the plaintiff in a citizen suit financially and technically responsible for pollution in discharges that permittee did not create. Or in the alternative, it

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[2] This Permit term was cited in the District's Petition at p.9. It was not cited by the Court of Appeals in its opinion because the term directly contradicts its holding that only the District was responsible for discharges from the MS4.

requires a permittee to remediate pollution that beyond its governmental authority to control or abate. FSA is not aware of any such allocation of responsibility in any MS4 in Florida.

B. The District May Own The Stormwater Conveyance Structure, But Cannot As A Matter Of Fact And Law Control The Stormwater Discharge For The Purpose Of Complying With Water Quality Standards

The Ninth Circuit fails to indentify any statutory or regulatory authority granted under California law or by agreement among the Co-Permittees that grants the District the power to mandate upstream MS4s to control emissions of pollutants in their stormwater discharges into the District's conveyances. Likewise, there is no cited authority allowing the District to take enforcement action against recalcitrant upstream sources to reduce pollution flowing into the District's flood control structures. The Permit states that "Permittees shall possess adequate legal authority to ... require persons [not Permittees] within their jurisdiction to comply with the conditions in the Permittee's ordinances, permits, contract or orders..." California State Water Resources Control Board for the Los Angeles Region NPDES Permit

Part 3.G.2, (2007). NRDC, 2011 WL 2712963, at *12 (emphasis added.)[3]

Consistent with these terms and the facts of the case, the District takes the position that it "does not generate any of the pollutants in the system, but only transports them from other permitted and non-permitted sources." Id. at *16. As a consequence, the District's physical channels and conveyances are simply conduits of stormwater flow whose chemical and physical characteristics have been dictated in whole or in part by the actions of others, some stormwater sources within the boundary of the MS4 and some outside that boundary.[4] This factual scenario is true for many MS4s in Florida and elsewhere in the nation.

Undeterred by facts, the Ninth Circuit mandated that the District must "control" the polluted stormwater flow at mass emission

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[3] A review of the Los Angeles County Flood Control Act that created the Flood Control District does not contain a grant of enforcement authority over municipalities within its territory. Cal. Water Code Appendix § 28-2

[4] The Permit includes stormwater that originates beyond the MS4 Permittees from unincorporated areas in Los Angeles County within the jurisdiction of the Regional Board. NRDC, 2011 WL 2712963, at *4. Extraterritorial flows into the MS4 makes the District's alleged authority to control discharges even more tenuous.

stations so that as not to cause or contribute to violations of water quality criteria downstream when its conveyance system discharges into the rivers. The Court of Appeals opined that "...there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District." Id, at *17. Assuming that the District lacks the practical ability as a matter of law to control or regulate the upstream constituents of that flow, how can the District comply with the Court's mandate and avoid citizens' suits? The real answer (and the eight hundred pound gorilla in the room with the District's Permit) is that the District alone cannot "control" the discharges no matter what the Clean Water Act says or how the Ninth Circuit interprets the provisions of the Permit as they apply to the District.

Apparently lacking its own legal mechanism to control stormwater pollution mass loading generated by its Co-Permittees, coupled with the mandate not to discharge pollutants to receiving waters under threat of fines for exceedance, the only logical option for the District acting alone would be the unthinkable and the undoable – to construct a series of diversions or dams to stop or divert the flow at the mass sampling station and treat the discharge such that it could not "cause

or contribute" to water quality criteria violations downstream.[5]

The Ninth Circuit's holding puts the District in an untenable position of a mandate to not to exceed water quality criteria, coupled with an inability as a matter of law to control upstream sources or perhaps even to raise capital to finance its own stormwater treatment,[6] assuming that it could technically design and operate such a facility to remove the pollutants. It would also follow that this remedy should be repeated at various points of conveyance throughout the District's system where mass emissions data indicated the potential

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[5] It could be argued that in order for the District not to be in violation of the Permit for either "causing or contributing" to exceedances of water quality criteria, the level of pollutants measured at a mass emissions monitoring station would have to be somewhere below the water quality criteria in order not to "contribute" to a possible exceedance. What that level would be the 9th Circuit does not say.

[6] The District's municipal powers for source control appear to be limited to raising funds by user fees to reduce stormwater and urban runoff pollution. Of those fees, the District is limited to receiving a 10% allocation of administrative and planning costs, while remaining fees are allocated to cities within the boundary of the District and nine (9) watershed authority groups. See Cal Water Code Appendix § 28-2-8a (2011).

to "cause or contribute" to exceedances of water quality criteria. For MS4s across the country, this result would impose an impossible burden.

To illustrate why FSA believes that this mandate imposes an impossible burden on MS4 permittees, consider the City of Santa Monica's Urban Runoff Recycling Facility (SMURRF) located within the MS4 at issue in the case. The SMURRF is a state-of-the- art, first-of-its-kind water recycling plant that treats dry weather, not wet weather urban runoff, for reuse for beneficial purposes. SMURRF cost approximately $12 million to construct including both the treatment and distribution systems for its recycled urban water. It drains a total of a little over 5000 acres (not square miles) and treats approximately 500,000 gallons of runoff per day. According to the City of Santa Monica figures, 100 million gallons of runoff flow through the County of Los Angeles on a dry day, which is more than 200 times the SMURRF's treatment capacity. Wet weather flows in the same area can increase to 10 billion gallons per day. www.smgov.net/uploadedFiles/Departments/OSE/Categories/Urban_Runoff/UR_SMURFF_Info_Sheets.pdf.

Doing the rough math leads to the approximation that the County could need the capacity of around 200 SMURRFs to process the dry day flow at a rough cost of $2.4 billion dollars. To take the example one step further, even if the 10 billion gallon per day wet weather flow could

somehow be captured in order to be treated, which is a physical impossibility due to the volume[7], the costs for treatment would be astronomical. It would be clearly more economical for the permittee to pay the citizens' suit penalties as they occur.

II. THE OPINION REJECTS THE MS4 PERMIT'S "ITERATIVE PROCESS" AS A RESPONSE TO EXCEEDANCES AT MASS EMISSIONS SAMPLING STATIONS.

The Ninth Circuit ignored pertinent provisions of the Permit that addressed the specific issue of how a Permittee is required to respond to exceedances. Part 2.3 of the Permit requires Permittees to comply with discharge prohibition set forth in parts 2.1 and 2.2 "through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with [the Los Angeles Stormwater Quality Management Program] (SQMP) and its components and other requirements of this permit ..." NRDC, 2011 WL 2712963, at *5. Most importantly, Part 2.3 of the Permit further provides that if exceedances of the

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[7] To hold one (1) million gallons, one would require a structure 267 feet long (almost as long as a football field), 50 feet wide, and 10 feet deep. U.S. Geological Survey, http://ga.water.usgs.gov/edu/mgd.html. One hundred football fields hold 100 million gallons. Ten billion gallons would require 10,000 structures.

water quality objectives or water quality standards persist, notwithstanding the implementation of the Stormwater Quality Management Plan and its components and other requirements of the Permit, Permittees "shall assure compliance with discharge prohibitions and receiving water limitations" by engaging in the "iterative process" procedure. Knee jerk enforcement of the numeric standards using civil penalties is certainly not the Permit's remedy for non-compliance.

This iterative procedure means the Permittee shall "promptly notify and thereafter submit a Receiving Water Limitations (RWL) compliance report ... to the Regional Board that describes [Best Management Practices (BMPs) that are currently being implemented] and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to exceedances of the Water Quality Standards." Id. at *6.

The process also requires that the Permittee revise its SQMP to incorporate approved modified BMPs that have been and will be implemented according to an implementation schedule. Part 3.A.3 requires Permittees to implement additional controls where necessary, to reduce the discharge of pollutants and stormwater to the [maximum extent practicable (MEP)]. In FSA's view, MEP is the performance standard for compliance with stormwater permits by statute and regulation.

The iterative process, written as an enforceable section of the Permit, is applicable to each and every Permittee and, focuses on the only viable control for discharges from MS4s – controls at the sources of the pollution before they enter the stormwater. If such controls do not result in stormwater that meets water quality criteria or standards, more stringent, additional management practices must be put in place, meaning controls will be put in place for each and every construction site, parking lot, and other discharge sources located within the boundaries of each Permittee. This comprehensive approach spreads the burden of compliance across the MS4 Permittees, and does not allow it to rest with only one. It reflects the fact that stormwater compliance is truly the sum of all efforts undertaken throughout the MS4.

Even when water quality standards have been violated, the importance of the iterative process has been expressly recognized by the California courts, yet rejected by the Ninth Circuit. In Building Industry Assn., the California Court of Appeals addressed the interplay between violations of water quality standards and BMP in a legal challenge to the MS4 permit in San Diego. The key findings by the California Court of Appeals in that case are directly on point with the facts of this case. That court expressly stated that compliance with water quality standards was to be done through "timely implementation of control measures" by engaging in a "co-operative iterative process" where

the Regional Water Quality Control Board as regulator, and the municipality work together to identify violations of water quality standards in a written report and then incorporate approved modified BMP to achieve compliance. Id at 146.

After noting that the Regional Water Quality Control Board could certainly enforce water quality control standards during this process, nonetheless appellate court stated that "the Water Boards have made clear in this litigation that *they envision the ongoing iterative process as the center piece to achieving water quality standards.*" Id. (emphasis added). The court also remarked that there was nothing in the record to indicate that the permittees would be subject to penalties for violation of water quality standards. Id. This case proves those remarks to be incorrect certainly as far as citizens suits are concerned.

So Building Industry Assn. sets a precedent to interpret the MS4 permit as requiring the "iterative process" in the Permit to achieve water quality standards. This approach should not be wholeheartedly cast aside in favor of penalty actions based on the Ninth Circuit's misconstruction of the CWA.

III. THE OPINION ERRONEOUSLY MANDATES COMPLIANCE WITH WATER QUALITY CRITERIA AND STANDARDS AT THE MASS SAMPLING POINT NEGATING MORE THAN 25 YEARS OF NPDES STORMWATER PERMITTING USING BASIN PLANS, BMAPS, TMDLS AND MEP IN ACCORDANCE WITH CWA.

The Court of Appeals ruled that compliance with Water Quality Standards or Water Quality Objectives, as measured by mass sampling at monitoring locations, was now the numeric standard for NPDES MS4 permit violations in lieu of the Maximum Extent Practicable (MEP) standard used in USEPA regulation and Florida MS4 permits. This ruling is contrary to all of the MS4 permits issued in the State of Florida to FSA members and non-members alike. The significant difference in approach between California and Florida is cause for serious concern among the regulated community because of the fundamental difference in how to comply – performance standards versus numeric criteria in monitoring stations. This concern will come into play when the USEPA has the opportunity to revise permit terms nationwide to incorporate numeric limitations in compliance with this opinion, a feat it attempted to implement unsuccessfully by

revising its own guidance document in 2011. See discussion in section V.

To understand the difference between the Ninth Circuit's approach and the Florida approach, the following paragraphs will discuss pertinent provisions of the current Lee County, Florida MS4 Permit (Lee County Permit) effective September 2011 – September 2016. The Lee County Permit was issued by FDEP, covers about 1200 square miles and includes 22 co-permittees including Florida Department of Transportation. Lee County, Florida.http://www.leegov.com/gov/dept/Natural Resources/NPDES/Documents/Leefinalpermit packageCycle3signed91311.pdf.

Lee County's MS4 permit starts with the provision that all existing stormwater discharges by the permittees are authorized under Florida law with a few enumerated exceptions that do not involve stormwater discharges that exceed numeric criteria. This starting point eliminates the result in NRDC where exceedances of numeric limitations were considered to be permit violations.

Part VIII of the Lee County Permit discusses the MEP standard and its critical role in Florida stormwater management. Directly contrary to the Ninth Circuit, FDEP asserts in Part VIII that "narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy

technology requirements (including reduction of pollutants to the MEP) and to protect water quality." Id. at p.87. Under Florida law, implementing the BMPs consistent with a stormwater management program (SWMP) "constitutes compliance with the standard of reducing pollutants to the MEP." Id. Furthermore, the MEP standard is applied to MS4s "in recognition of the fact that an operator typically does not have total control over the quality or quantity of stormwater entering its system and ultimately entering waters of the State." Id. This is exactly the situation facing the District in the case at bar.

For so-called Impaired Waters, where USEPA or FDEP has adopted Total Maximum Daily Loads (TMDLs) for the water body, the stormwater regulatory process for Lee County becomes more complex. TMDLs set specific daily loads for chemical parameters in the impaired water. TMDLs are not water quality standards but are based on water quality standards set in the receiving waters. This daily load is allocated to individual dischargers by means of wasteload allocations (WLAs) that are exactly what they sound like – allocation of waste load for a given discharger. For stormwater discharges, adequate progress toward achieving the WLA is demonstrated through "implementation of structural and nonstructural best management practices [BMPs] and other program activities that are targeted at the TMDL pollutant" and apply to the specific watershed. Id Exceeding WLAs at the

source (not at the monitoring station) is not a violation of the permit as long as parameters subject to TMDLs/WLAs are reduced to MEP through implementation of the BMPs in the SWMP. So exceedances of numeric limits do not constitute permit violations in Florida.

Contrast Lee County's methodical, phased approach to compliance with the holding in this case. Ironically, Lee County's permit terms are totally in line with the iterative process in the San Diego MS4 Permit discussed in Building Industry Assn. In the Ninth Circuit, however, these permit provisions for implementation of MEP through an iterative process in the District's Permit are given short shift.

IV. THE NINTH CIRCUIT'S MANDATE THAT WATER QUALITY CRITERIA AND WATER QUALITY STANDARDS BE POINTS OF COMPLIANCE FOR MS4s OVER AND ABOVE THE REQUIREMENT TO COMPLY WITH BEST MANAGEMENT PRACTICES TO THE "MAXIMUM EXTENT PRACTICABLE" WAS PROPOSED BY EPA AS A POLICY CHANGE IN 2010, WAS REJECTED BY STAKEHOLDERS IN 2011 AND HAS NOT BEEN IMPLEMENTED TO DATE

The Ninth Circuit's yearning to impose numeric water quality standards on stormwater discharges from MS4s is not new and is certainly not unique. In 2010 USEPA took the opportunity to update its 2002 guidance memorandum on stormwater discharge control in an attempt to effectuate that goal – to encourage states almost to the point of mandating them to use numeric criteria in MS4 permits they issue. See EPA's November 2010 "Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NDPES Permit Requirement Based on Those WLAs" (2010

Memorandum). USEPA, http://www.epa.gov.npdesp u/pubs/establishingtmdl wla_revision.pdf.

USEPA had noted in 2002 that water quality based effluent limitations (WQBEL) for NPDES-regulated MS4s would most likely be in the form of Best Management Practices (BMPs), not numeric limitations. But in 2010, USEPA believed times had changed. For example, USEPA thought that by 2010 the regulatory authorities had more experience in developing TMDLs and WLAs for stormwater sources, the technical capacity for stormwater monitoring had become more widespread and "sophisticated," and the effectiveness of BMP was now more easily measured. Id. at p. 1. As a result, in the 2010 Memorandum USEPA opined that WQBELS "can clarify permit requirements and improve accountability and enforceability." Id. at p. 2. Finally, EPA recommended that permitting authorities exercise discretion to include numeric effluent limitations as necessary to meet water quality standards where it is feasible to do so. Id.

MS4s and other interested parties immediately filed objections with USEPA to the approach in Memorandum, arguing that the addition of numeric criteria was not supported by the requirements of the USEPA's MS4 permit regulations nor the requirements of the CWA. MS4 permit regulations provided in pertinent part that the stormwater management program required for a permit must contain a comprehensive planning process to reduce the discharge of pollutant to the

Maximum Extent Practicable [MEP] using management practices, control techniques and system design and engineering methods and such other provisions which are appropriate. 40 C.F.R. Section 122.26 (d)(2)(iv)(2011). There is no mention of numeric limitations in the regulations, let alone the concept that numeric limitations should supersede MEP.[8] Requiring a numeric limitation in MS4s permit blatantly ignores the text regulation and raises the question of whether such a change can be accomplished without notice and comment rulemaking.[9]

The MS4's comments also fundamentally disagreed with the USEPA's assertion that the regulated communities' knowledge of stormwater has improved significantly since 2002. To the contrary, while the industry knowledge about the

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[8] The Ninth Circuit expressly rejected MEP as the exclusive standard for compliance. NRDC, 2011 WL 2712963, at *14.

[9] The 9th Circuit cites with approval the Building Industry Assn decision rejecting the argument that under federal law, MEP is the exclusive measure that may be applied to municipal storm water discharges. NRDC WL 2712963, at *14. In turn, Building Industry Association cited *dicta* from the 9th Circuit case in Defenders of Wildlife v. Browner, 191 F.3d 1159 (9th Cir. 1999) to the effect that CWA Section 1342 (p)(3)(B)(iii) gave USEPA the authority to determine that ensuring MS4 permits must strictly comply with state water quality standards is necessary to control pollutants, thereby falling within the gamut of "such other provisions as the Administrator... determines appropriate for the control of such pollutants" Id. at 1166-1167.

complexity of the system has improved, it is the MS4 community's view that correlation between monitoring and understanding of pollutant impacts on water quality has not kept pace with the knowledge. As a result, MS4s believed that factual rationale for the EPA's 2010 Memorandum was insufficient to support the Agency's analysis or conclusions.

These objections from MS4s throughout the country, coupled with the outcry from others in the regulated community were apparently significant enough to cause the USEPA to issue a call for formal public comments on the proposed 2010 Memorandum by letter dated March 17, 2011. http://www.epa.gov/npdes/pubs/sw_tmdlwla_comments.pdf. A final version of the 2010 Memorandum, revised or not, has never been released by the Agency. The fact that the Ninth Circuit apparently took up where EPA policy voluntarily left off calls for scrutiny by this Court to decide whether the CWA along with its implementing regulations and policies for MS4s can be reinterpreted by the Ninth Circuit in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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November 14, 2011

AMICUS CURIAE BRIEF

No. 11-460

In The

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, *Petitioner,*

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.and SANTA MONICA BAYKEEPER, *Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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November 14, 2011

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INTERESTS OF THE *AMICI CURIAE* [1]

The League of California Cities and the California State Association of Counties, as representatives of local government entities and municipalities throughout California, have a vital interest in ensuring that cities and counties have clear guidance concerning the application of the Clean Water Act to a Municipal Separate Storm Sewer System ("MS4"). As explained in greater detail below, the Ninth Circuit Court of Appeals' recent published opinion in *Natural Resources Defense Council v. County of Los Angeles* reflects the confusion and ambiguity in the Ninth Circuit over: 1) what it means to discharge from an MS4 to waters of the United States, particularly where the MS4 includes portions of navigable waters that have been improved for flood control purposes; 2) how the boundaries of MS4s and "waters of the United States" are defined; and 3) how MS4 regulation differs from that of other point sources.

The League of California Cities ("League") is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal

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[1] Under Supreme Court Rule 37.2(a), counsel of record received at least 10 days notice of the intent of these *amici curiae* to file this brief, the parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a significant matter affecting all counties in California.

The rules adopted by the Ninth Circuit affect how billions, if not trillions, of dollars will be spent in California in the coming decades, and exposes local governments and their employees to significant civil and criminal liability for operating an MS4 that accepts stormwater and urban runoff. The Court should grant certiorari in this case to clarify the issues set forth above, and rectify the confusion wrought by the Ninth Circuit's opinion.

SUMMARY OF THE ARGUMENTS

In ruling on this citizen suit filed under the Clean Water Act (hereinafter "CWA" or "Act"), the Ninth Circuit concluded that water flowing from one portion of a river to another portion of the same river

constituted a discharge of pollutants subject to the requirements of a National Pollutant Discharge Elimination System ("NPDES") permit. Here, water flows from the improved, upstream portions of two Southern California rivers (the Los Angeles River and the San Gabriel River), to the unimproved, downstream portions of the same rivers. The upstream portions are part of the MS4 operated by the Petitioner Los Angeles County Flood Control District ("District"), while the downstream portions are not. But, according to the Ninth Circuit, the flow of water through a single river constitutes a "discharge" under the Clean Water Act because that flow crosses an invisible jurisdictional line. (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *17-18 (9th Cir., July 13, 2011).) In other words, the Ninth Circuit has arbitrarily divided the Los Angeles and San Gabriel Rivers into sections based on the invisible jurisdictional boundary of the District's MS4, and held that the flow of water traveling from one section of each river to another violated the CWA.

Although the Ninth Circuit recognized that plaintiffs were required to prove that polluted stormwater passed through an outfall of the District's MS4 to show a violation, the Ninth Circuit did not require the plaintiffs to actually identify such an outfall. Rather, the Ninth Circuit held that "the precise location of each outfall is ultimately *irrelevant* because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL

2712963, *17 (9th Cir., July 13, 2011)(emphasis added).) This interpretation violates the CWA, which requires a citizen-suit plaintiff to prove a discharge of a pollutant from a point source to navigable waters. The Ninth Circuit has essentially eliminated the "point source" requirement from the Act, at least as it relates to stormwater.

In reaching this conclusion, the Ninth Circuit apparently assumed that the boundary of the MS4 is necessarily an outfall, even where that boundary lies within the confines of a single river. The Ninth Circuit's holding directly conflicts with the Supreme Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004), and must be overturned. Failure to do so could result in billions or trillions of dollars in potential liability and compliance costs, and would make it impossible for local governments to determine the point at which regulatory compliance is measured. Failure to clarify the legal requirements would also make MS4 owners and operators sitting ducks for citizen suit plaintiffs more interested in recovering attorneys' fees than in improving environmental conditions.

The Ninth Circuit also added to the considerable confusion over what waters are navigable waters of the United States subject to the Clean Water Act. Following this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the federal courts are in disarray over when the Clean Water Act applies and when it does not. See, e.g., *United States v. Donovan*, -- F.3d --, 2011 WL 5120605 *5 (3d Cir. Oct. 31, 2011) ("the Courts of Appeals are split on the proper interpretation of *Rapanos* ...."). This confusion, left in place, will

haunt state and local governments on a daily basis. Clear guidance from this Court is required.

Finally, the Ninth Circuit also held that permitting of stormwater discharges for municipalities is *no* different than permitting for standard, end-of-pipe industrial discharges. (*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *12 (9th Cir., July 13, 2011).) This is mistaken. The Ninth Circuit failed to consider Congress's distinct approach for the regulation of municipal stormwater discharges. While NPDES permits have been required for municipal stormwater discharges since 1989 under 33 U.S.C. §1342(p), these discharges require only the reduction of pollutants to the *maximum extent practicable* ("MEP"), not strict compliance with water quality standards. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999). Unlike industrial dischargers, local governments cannot simply go out of business or find another way of dealing with billions of gallons of stormwater that fall each year within our cities and counties. A municipality is required to accept urban runoff from private development. To avoid catastrophic flooding, only one realistic method exists for dealing with municipal stormwater: channeling it to the nation's greater waterways.

The Ninth Circuit failed to follow its precedent and this Court's guidance, interpreting the District's permit to impose a strict requirement to meet water quality standards instead of asking whether the District was reducing the discharge of pollutants to the MEP. This discrepancy must be remedied in order to provide regulatory certainty for the

thousands of local governments that exist within the vast expanse of the Ninth Circuit.

The League and CSAC, as *amici curiae*, respectfully request that this Court grant the District's petition for writ of certiorari and review the decision below for the following reasons:

- The Ninth Circuit ignored this Court's precedent in the *Miccosukee Tribe* case regarding what it means to discharge to waters of the United States from an MS4.

- Federal courts, as well as all dischargers under the Act, need this Court's guidance regarding the definition of "water of the United States" given the confusion in the lower courts after *Rapanos*.

- The Ninth Circuit ignored its own precedent and clear Congressional intent to treat municipal stormwater discharges differently from other discharges subject to the Act's NPDES permit program.

The ability of government entities to control flooding and facilitate drainage of the stormwater within their jurisdictions is essential. (*See New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460 (1905)("The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised.").) Indeed, flood control is one of the most basic functions of local government. In order to end the legal inconsistencies and confusion created by the decision below, and to provide a clear set of legal

guidelines for local governments regarding the location and manner of compliance for MS4 discharges, *amici* respectfully request this Court grant the petition and reverse the decision below.

REASONS WHY THE WRIT SHOULD BE GRANTED

THE CONFUSION CAUSED BY THE NINTH CIRCUIT'S DEPARTURE FROM THIS COURT'S PRECEDENT REGARDING WHAT IT MEANS TO DISCHARGE TO WATERS OF THE UNITED STATES MUST BE REMEDIED.

The CWA prohibits the discharge of pollutants from a point source into the waters of the United States without a permit. (33 U.S.C. §§1311(a), 1342.) The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." (33 U.S.C. §1362(12)(A).) In order to prove a violation of the Act, a plaintiff must demonstrate that each element of a "discharge" occurred. (*See U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F. Supp. 2d 239, 246 (D. Me. 2002).)

A Municipal Separate Storm Sewer System ("MS4") generally contains multiple point sources,[2] called outfalls. An "outfall" is "a *point source* as

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[2] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. §1362(14); 40 C.F.R. §122.2.)

defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States." (40 C.F.R. §122.26(b)(9).) An outfall "does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States." (40 C.F.R. §122.26(b)(9).)

This regulation is consistent with the reading of the plurality opinion of this Court in *Rapanos v. United States*, which emphasized that "point sources" and "navigable waters" are distinct and separate categories. (*Rapanos*, 547 U.S. 715, 735 (2006)("The definition of 'discharge' [*to* navigable waters *from* a point source] would make little sense if the two categories were significantly overlapping.").) Thus, a discharge from an MS4 occurs where the MS4 discharges pollutants from a non-navigable point source (i.e., an MS4 outfall) to waters of the United States. However, where an MS4 also includes portions of a waterway, and water is conveyed from the MS4 portion of a navigable water to the non-MS4 portion of the same navigable water, no addition of pollutants to a navigable water has occurred.

Further, an MS4 conveyance that allows for the movement of water from one part of a water of the United States to another does not "discharge" pollutants. As this Court held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), the movement of water within a single water body "cannot constitute an 'addition' of pollutants." The flowing water represents a unified system that cannot be

arbitrarily parsed into segments. "As the Second Circuit put it in *Trout Unlimited*, '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'" (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004)(citing to *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2nd Cir. 2001).)

In holding that the natural downstream movement of water in the Los Angeles and San Gabriel Rivers through portions of the District's MS4 constituted discharges from the District's MS4, the Ninth Circuit ignored this Court's precedent and created confusion over what is a discharge, and what is not. This Court should undertake review of this case to remedy the substantial confusion and inconsistency wrought by the decision below. This Court should confirm that the movement of water within a single water body does not constitute a discharge from a point source or outfall under the CWA, regardless of whether portions of the water body are included in an MS4.

Congress did not intend for stormwater conveyances to be treated as "waters of the United States." Rather, Congress defined these conveyances as "point sources" to be regulated at the point that they discharge into a "water of the United States."[3]

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[3] The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source [or] any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source...." (33 U.S.C. §1362(12) (emphasis added).) "Navigable waters" is defined as "waters of the United States, including the territorial sea," (33 U.S.C. §1362(7).)

The difference, while subtle, is important. It is akin to deciding whether an entire garden hose is regulated, or only the point at which water flows out of the hose. The Ninth Circuit blurred the line between a "point source" and "water of the United States" by considering the Los Angeles and San Gabriel Rivers to be both, simultaneously. This is untenable, and makes the point of regulatory compliance impossible to determine. Local governments now have no idea how to determine *where* to measure compliance with MS4 permits.

This issue is of critical importance to the *amici*; as most cities and counties in California are covered by an MS4 permit issued under California's discharge permitting program. (*See accord* 33 U.S.C. §1342(b).) Thus, it is critical for MS4 owners and operators to understand where the point of compliance will be measured under that program. This will allow them to measure performance, institute changes, and have certainty regarding their potential legal exposure.

THE DEFINITION OF "WATERS OF THE UNITED STATES" MUST BE CLARIFIED IN VIEW OF THE CONFUSION FOLLOWING THE *RAPANOS* DECISION.

The decision below reflects and exacerbates a greater national issue, which is the confusion over what constitutes "waters of the United States" in light of this Court's decision in *Rapanos v. United States*, 547 U.S. 715, 735 (2006).

Writing for a four-justice plurality, Justice Scalia's definition of "waters of the United States" correctly focused on whether a discharge ultimately

reached a "waters of the United States." (*Rapanos*, 547 U.S. at 742.) But the plurality decision did not explain how to determine when a water body is a point source or a water of the United States. The classification of a conveyance as either a "point source" or a "water of the United States" is of critical importance in NPDES permitting in order to determine whether that conveyance requires a discharge permit and, if so, the appropriate point of compliance for the discharge from that conveyance.

The state of the law on this issue is less than clear, and is particularly murky in the Ninth Circuit. In 2001, in *Headwaters, Inc. v. Talent Irrigation District*, (243 F.3d 526, 533 (9th Cir. 2001)), the Ninth Circuit held that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water." However, most point sources, including pipes, ditches, and channels, are also tributary to natural streams. (33 U.S.C. §1362(14); 40 C.F.R. §122.2.) Further, the water contained in irrigation channels is expressly exempt from the NPDES permitting requirements. (33 U.S.C. §1342(*l*)(1)("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.") Thus, the Ninth Circuit turned the analysis on its head by transforming permit-exempt irrigation canal "point sources" into "waters of the United States."

The Ninth Circuit concluded that its decision in *Headwaters* was consistent with this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531

U.S. 159 (2001) ("SWANCC"). According to the Ninth Circuit, "[t]he irrigation canals in this case are not 'isolated waters' such as those that the Court concluded were outside the jurisdiction of the Clean Water Act[,] [b]ecause the canals receive water from natural streams and lakes, and divert water to streams and creeks." (*Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001).) Certainly no such leap of logic or holding follows from *SWANCC*. The fact that isolated waters are beyond the reach of the Clean Water Act does not sanction the contrary; that every *non-isolated* water *is* within the Act's reach.

In *Headwaters*, the Ninth Circuit also relied on another pre-*Rapanos* decision, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), in which the court held that a drainage ditch, which was "part of a storm drainage system designed to discharge stormwater into Tampa Bay," was "a tributary of Tampa Bay and thus a 'water of the United States.'" (*Eidson*, 108 F. 3d at 1342-43.) However, the *Eidson* decision was expressly called into question by the plurality in *Rapanos*. (*See Rapanos*, 547 U.S. at 725 (plurality opinion).)

Despite intervening developments, the Ninth Circuit has concluded that the *Rapanos* decision "has not undercut our prior analysis," and has continued to apply the *Headwaters* rule. (*See United States v. Moses*, 496 F.3d 984, 989-90 (2007)(stating that Justice Kennedy's concurring opinion in *Rapanos* "is the controlling rule of law" and that "[t]he plurality's first requirement-permanent standing water or continuous flow, at least for a period of 'some months,'- makes little practical sense").)

The practical impact here cannot be overstated. A conveyance is either a "point source," or a "water of the United States." It cannot logically be both. This classification is material, of course, because without this knowledge, cities and counties cannot know which water quality standards apply to the waters to which they discharge,[4] and cannot make improvements to reduce pollutants to the maximum extent practicable with the ultimate goal of eventually achieving water quality standards.

The Act specifically requires MS4s to employ controls or best management practices to the maximum extent practicable. (33 U.S.C. §1342(p)(3)(B)(iii).) These measures can be easily accomplished within the MS4, from which weeds, algae and trash can be removed, or in which booms or filters can be placed to halt or reduce pollutants before they reach the downstream "water of the United States." But no such management can take place within a "waters of the United States" without significant federal oversight. For example, moving dirt within a river-bottom or placing equipment into a "navigable" ditch to remove weeds and promote the free flow of water would require a CWA section 404 permit. (33 U.S.C. §1344.) Doing those same activities within the MS4 would not.

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[4] Different "waters of the United States" may possess different beneficial uses and water quality criteria set to protect those uses (e.g., water quality standards). (*See* 33 U.S.C. §1313(c)(2)(A)). Water quality standards generally do not apply within an MS4 (i.e., on municipal streets, or in curbs, gutters, ditches, manmade channels, and storm drains). (*See* 40 C.F.R. §122.26(b)(8)(definition of "municipal separate storm sewer").)

Moreover, a stormwater discharge or a non-storm water spill within an MS4 system does not necessarily flow downstream to a "waters of the United States." In some instances, a discharge or spill could be fully contained and remediated within the MS4 system. (*See accord* 40 C.F.R. §122.2 (definition of "waters of the United States" excludes waste treatment systems designed to meet the requirements of the CWA).) For example, trash falling into an open MS4 could be screened out and removed prior to discharge into "navigable waters." But if the MS4 itself is a navigable water, then the Act has been violated as soon as the object makes contact with the water.

Further, discharges or a spill to a non-flowing MS4 channel or the dry bed of a seasonal non-navigable tributary stream should not constitute discharges to a "water of the United States." Such spills could be (and often are) fully remediated and never mix with any navigable waters. (*See Rapanos v. U.S.*, 547 U.S. at 734 (including "storm sewers and culverts" within the definition would stretch "the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this "Land Is Waters" approach to federal jurisdiction."), and at 716 (the CWA authorizes federal jurisdiction only over "waters").) In addition, retention ponds placed within an MS4 to slow the flow of water and allow pollutants attached to the soil to be deposited before the water flows on to a water of the United States should be excluded from the definition of "waters of the United States." (*See accord* 40 C.F.R. §122.2 (definition of "waters of the United States" exclusion for waste treatment exception).)

But if, as the Ninth Circuit held, the MS4 also constitutes "waters of the United States," these remedial activities cannot occur without a separate dredge and fill permit under CWA section 404, and possibly approval under the Rivers and Harbors Act of 1899. (33 U.S.C. §1344; 33 U.S.C. §403.) The Ninth Circuit's interpretation reduces the entire exercise to an absurd vortex of permitting, in which a local government that cannot refuse stormwater flow would be in automatic violation for months and years while it awaits permits to add the simplest management practices to its system. In short, the state of the law is a mess that must be cleaned up.

For these reasons, this Court should grant the petition and explicitly spell out the differences between MS4s, tributaries, and "waters of the United States."

I.. THIS COURT MUST VALIDATE CONGRESS' INTENT TO TREAT MS4 DISCHARGES DIFFERENTLY FROM OTHER DISCHARGES.

The decision below fundamentally misconstrues the Act's mandates for municipal stormwater regulation. Under section 402(p)(3)(B) of the Act, Congress established a distinct approach for the regulation of municipal stormwater discharges and subjected them to a different set of requirements. (33 U.S.C. §1342(p)(3)(B).) By imposing liability based simply on the presence of pollutants within the MS4 conveyance, the Ninth Circuit fails to respect the special treatment that the Congress afforded to municipal storm water systems.

NPDES permits for other categories of discharges, including *industrial* stormwater

discharges, must contain technology-based effluent limitations and any more stringent water quality-based effluent limitations necessary to meet applicable water quality standards. (*See* 33 U.S.C. §1311(b)(1)(A) and (C) (CWA §301(b)(1)(A) and (C) requiring Best Practicable control Technology ("BPT") or "any more stringent limitation, including those necessary to meet water quality standards"); 33 U.S.C. §1311(b)(2) (CWA §301(b)(2) requiring Best Available Technology economically achievable ("BAT") for toxic pollutants and Best Conventional pollutant control Technology ("BCT") for conventional pollutants); 33 U.S.C. §1342(p)(3)(A) (CWA §402(p)(3)(A))(industrial stormwater regulation).)

In contrast, municipal stormwater discharges from MS4s are to be regulated by NPDES permits that:

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.

(33 U.S.C. §1342(p)(3)(B)(i)-(iii) (CWA §402(p)(3)(B)(i)-(iii)) (emphasis added).)[5]

The "Maximum Extent Practicable" standard in Section 302(p)(3)(B)(iii) mandates that an MS4 permit require municipalities to pursue sound pollutant control techniques that are technically and economically feasible. The Clean Water Act recognizes that MS4s are unlike individual facility NPDES permittees, such as an industrial facility or a wastewater treatment plant. Municipalities may have little control over the drainage received from private property within their boundaries, or from other permitted entities that discharge stormwater or wastewater into the local storm drains and waterways.[6]

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[5] Importantly, the CWA does not prescribe water quality-based requirements for municipal stormwater. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).) Water quality-based requirements differ from technology-based requirements in that water quality-based requirements are set based on the ambient water quality of and the applicable water quality standards for a particular water body, while technology-based standards focus upon the water quality achievable by particular pollution control measures or technologies. This partial exemption is not unusual as the CWA also *totally exempts* some types of discharges from the permitting requirements of the Act. (*See* 33 U.S.C. §1342(*l*)(1)-(2)(CWA §402(*l*)(1)-(2))(exempting agricultural return flows from irrigated agriculture and certain discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).)

[6] Moreover, municipalities never requested coverage under the CWA for these discharges of rainwater falling on the ground inside their municipal boundaries; this liability was involuntarily thrust upon them by Congress in 1989 without a source of funding for this expensive and extensive regulatory program. And, unlike industrial dischargers, cities and

The decision below appears to misconstrue the purpose of the "maximum extent practicable" standard as to make the permitting agency's job easier:

> Rather than evincing any intent to treat permitting "differently" for municipalities, the EPA merely explains why state authorities that issue permits should draft site-specific rules, as the Regional Board did here, and why water-quality standards may be preferable over more-difficult-to-enforce effluent limitations.

(*Natural Resources Defense Council, Inc. v. County of Los Angeles*, -- F.3d --, 2011 WL 2712963, *12 (9th Cir., July 13, 2011).)

This interpretation is misguided. While regulatory efficiency was certainly a goal of Congress' in enacting the program, Congress also applied a different standard based on the unique position and function of local government entities.

The Ninth Circuit summarily dismissed the District's arguments about the challenges and special nature of municipal storm water regulation. In so doing, the decision below sets up a false dichotomy between the CWA and the District's position, which it labels "immunity for municipal discharges":

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counties cannot go out of business to avoid regulation and the associated costs and civil and criminal liabilities. (33 U.S.C. §1319(a)-(d).)

> Avoiding wooden permitting requirements and granting states flexibility in setting forth requirements is not equivalent to immunizing municipalities for stormwater discharges that violate the provisions of a permit.

(*Id.*)

This Court must review this case to confirm that municipal storm water permits should be interpreted consistently with the unique character of storm water conveyance by MS4 owners and operators, who have a critical public mandate to transport water from sources they do not control to protect their citizens from flooding and related health and safety problems.

The decision below not only ignores the separate statutory regulation of MS4s, but also ignores its own precedent. In *Defenders of Wildlife v. Browner*, the Ninth Circuit held that MS4 permits were ***not*** required to strictly meet water quality standards, (191 F.3d 1159, 1164-66 (9th Cir. 1999)), a holding ignored when it decided the case at hand.

In *Defenders*, the Ninth Circuit held:

> Congress' choice to require industrial storm-water discharges to comply with 33 U.S.C. §1311, but not to include the same requirement for municipal discharges, must be given effect. When we read the two related sections together, we conclude that 33 U.S.C. §1342(p)(3)(B)(iii) does not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C).

> Application of that principle is significantly strengthened here, because 33 U.S.C. §1342(p)(3)(B) *is not merely silent* regarding whether municipal discharges must comply with 33 U.S.C. §1311. Instead, §1342(p)(3)(B)(iii) *replaces* the requirements of §1311 with the requirement that municipal storm-sewer dischargers "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator ... determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B)(iii). In the circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. §1311(b)(1)(C).

(*Defenders*, 191 F.3d at 1165-66 (emphasis added).)

In the decision below, the Ninth Circuit takes the opposite tack, holding that strict compliance with water quality standards ***was*** required. In so doing, the Ninth Circuit not only ignored its own precedent, but disregarded the other 70 pages of the MS4 Permit that give context to the sentence at issue, the MS4 Permit's explanatory Fact Sheet, and other relevant state-wide precedent on the matter.

For these and the other reasons set forth herein, this Court should review this matter of vital importance to cities and municipal entities nationwide. The magnitude of the problems created by the Ninth Circuit's Opinion for counties and other municipalities around California is immense.

California's cities and counties are already experiencing financial crises and the decision below, mandating immediate and strict compliance with water quality standards, will cost these entities billions of dollars. The Ninth Circuit's ruling will place many local governments on the verge of bankruptcy, and will subject all to massive civil liability to any "person" who decides to file suit. (*See* 33 U.S.C. §1365(a).) The Court should grant the petition, wipe this bad decision off the books, and clarify where and how the Clean Water Act regulates MS4 discharges.

CONCLUSION

For the foregoing reasons, *amici curiae* the League of California Cities and the California State Association of Counties support the Petition for a Writ of Certiorari of the Los Angeles County Flood Control District.

Respectfully submitted,

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Dated: November 14, 2011

AMICUS CURIAE BRIEF

No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Flood And Stormwater Management Agencies ("NAFSMA") respectfully submits this brief as *amicus curiae* in support of the Petitioner, Los Angeles County Flood Control District (the "District").[1]

INTERESTS OF THE *AMICUS*

NAFSMA is a national non-profit association of municipalities, special purpose public districts and state agencies. Its members represent a broad nationwide spectrum of flood control, stormwater management, water conservation, and other water-related districts, bureaus, departments, and other instruments of local, regional and state government. NAFSMA's member agencies serve a combined population of millions of people nationwide and are responsible for the protection of lives, property and the environment from the impacts of storm and flood waters.

[1] Pursuant to Rule 37.2 of this Court, counsel of record for all parties was provided with notice at least 10 days prior to the deadline for its submission of NAFSMA's intention to file this *amicus* brief. All parties have consented to the filing of this brief and written consents are being lodged herewith. In accordance with Rule 37.6, NAFSMA represents that counsel for the *amicus* authored this brief in its entirety and that no person or entity other than the *amicus* and its representatives made any monetary contribution to the preparation or submission of this brief.

NAFSMA has an interest in this litigation because its members are directly involved in the administration of stormwater utilities and the implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act and by the state and federal regulations implementing that provision. Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements. The Ninth Circuit's decision in this case will seriously undermine the ability of NAFSMA's municipal stormwater permit holding members to demonstrate compliance with their permits, and will significantly increase the risk of wasteful litigation over the terms and conditions of those permits.

STATEMENT OF THE CASE

NAFSMA adopts the statement of the case contained in the District's Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision involves the resolution of an important question of federal law in a manner that conflicts with relevant decisions of this Court, because it found the Petitioner to be liable for the "discharge of a pollutant" that merely

passed from one portion of the same body of water to another.

Furthermore, if not reversed, the Ninth Circuit's decision would throw the entire NPDES permit program, including the municipal stormwater permit program, into disarray by virtue of the fact that the court found it was unnecessary to determine whether the pollutants in question were actually discharged through an outfall in the portion of the municipal stormwater system operated by the Petitioner.

ARGUMENT

I. THE DECISION BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH RELEVANT DECISIONS FROM THIS COURT

The Plaintiffs in this case alleged that the County of Los Angeles and the Los Angeles County Flood Control District are liable for violating the terms of their NPDES stormwater permit because exceedances of the applicable state water quality standards ("WQS") were measured at certain monitoring stations located in four "Watershed Rivers" within the Los Angeles region: the Los Angeles River, the San Gabriel River, the Santa Clara River and Malibu Creek. The District Court granted summary judgment to the Defendants on these claims because it found that the Plaintiffs had failed to present evidence sufficient for the court to determine whether stormwater discharged from the portion of the Municipal Separate Storm Sewer

System ("MS4") operated by the Defendants caused or contributed to the WQS exceedances detected at the monitoring stations located in each of the four rivers. Specifically, the District Court ruled that the Plaintiffs "failed to establish a basis for the court to find that standards-exceeding pollutants passed through County or District outflows upstream of the mass emissions stations at or near the time that exceedances were observed downstream." April 26, 2010 Order at 4. Explaining its decision, the District Court stated:

> That the pollutants must have passed through an outflow is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit. A co-permittee, including the county and the District, is responsible "only for a discharge for which it is the operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("Co-permittee means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is the operator.")

April 26, 2010 Order at 3.

On review, the Ninth Circuit agreed with both the District Court's reasoning and its decision with regard to the instream WQS exceedances observed in

the Santa Clara River and Malibu Creek. The court noted that:

> While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "discharges from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are prohibited." "[D]ischarge of pollutant" is defined as "any addition of any pollutant to navigable waters from any point source[.]" 33 U.S.C. § 1362(12). Under the Clean Water Act, the MS4 is a "Point Source." *See* 33 U.S.C. § 1342(p)(2), 1362(14). "Navigable waters" is used interchangeably with "waters of the United States." *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). Those terms mean, inter alia, "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide[.]" 40 C.F.R. § 122.2. ***The Watershed Rivers are all navigable waters.***

Slip Op. at 9459 (emphasis added). The Ninth Circuit agreed with the District Court that, on the record before it, it was not possible to establish responsibility for exceedances detected in the Santa Clara River and Malibu Creek, because it was unable to identify the relationship between the MS4 and the

mass-emission stations, which "are located within the rivers themselves." Slip Op. at 9463.

With regard to the exceedances detected in the Los Angeles and San Gabriel Rivers, however, the Ninth Circuit found, "as a matter of law and fact," that the rivers below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations. The basis for this finding was that the monitoring stations in those two rivers are in "concrete portions of the MS4 controlled by the District." Slip Op. at 9463. According to the Ninth Circuit,

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Slip Op. at 9461.

The Ninth Circuit's ruling is erroneous as a matter of law, and in direct conflict with relevant decisions from this Court. The court's only basis for distinguishing the location of the monitoring stations in the Los Angeles and San Gabriel Rivers from those in the Santa Clara River and Malibu Creek were that they were located in portions of those rivers that

(1) flowed through man-made, concrete channels, and (2) were owned and operated by the District. Neither of these facts can support the Ninth Circuit's erroneous legal conclusion that these locations were MS4 "point sources" rather than "navigable waters." As Justice Scalia wrote for the plurality in *Rapanos v. United States*, 547 U.S. 715, 736 (2006), the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." Furthermore, although the definition of "point source" includes "ditch[es], channel[s], and conduit[s]," an open channel through which water permanently flows is ordinarily described as a "stream," not as a "channel," because of the continuous presence of water. *Id.* at 736 n. 7.

Other courts have found that whether various bodies of water are man-made makes no difference to their classification as navigable waters. *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997), *overruled on other grounds, United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007). Consequently, courts have acknowledged that ditches and canals, as well as streams and creeks, can be "waters of the United States." *Id.* The fact that portions of the rivers involved in this case are owned and operated by the District for flood control purposes is also irrelevant. As this Court has previously ruled, one cannot "denationalize" national waters by exerting private control over them. *S.D. Warren Co. v. Maine Bd. of Env.*

Protection, 547 U.S. 370, 379 n. 5 (2006) (citing *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913)).

What is more to the point, and indeed determinative in this case, is that ***all*** reaches of the Los Angeles and San Gabriel Rivers, including those in which the mass emission monitoring stations are located, are classified as "receiving waters" under the Petitioner's permit and the State of California's applicable water quality standards. Part 5 of the permit defines the "Receiving Waters" for discharges from the MS4 as "all surface water bodies in the Los Angeles Region that are identified in the Basin Plan." The "Basin Plan" refers to "the Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties, adopted by the Regional Board on June 13, 1994 and subsequent amendments." *Id.* Reference to the list of streams identified in the Basin Plan shows that all portions of the Los Angeles and San Gabriel Rivers, from their headwaters to their estuaries, have been assigned a variety of beneficial uses by the Los Angeles Regional Water Quality Control Board – uses which in turn define the "Receiving Water Limitations" that apply to those waters.[2] *See* Basin Plan at

[2] Pursuant to CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), each State adopts the applicable WQS for its waters, which consist of the "designated uses" of the waters involved and the "water quality criteria" based on such uses. The "Basin Plan" for the Los Angeles Region contains the WQS applicable to the rivers involved in this case.

Section 2 ("Beneficial Uses"); Table 2-1 ("Beneficial Uses of Inland Surface Waters"); Fig. 2-8 ("Major surface waters of the Los Angeles River watershed"); and Fig. 2-9 ("Major surface waters of the San Gabriel River watershed").[3]

The location of the mass emission monitoring stations at issue in this case was described in the Ninth Circuit's opinion by reference to the narrative descriptions contained in Section 2 of the "Los Angeles County 2006-07 Stormwater Monitoring Report," which is available at http://dpw.lacounty.gov/wmd/NPDES/2006-07tc.cfm. More enlightening is the map of those locations in Fig. 2-1 from the same report [reproduced in the Appendix to this brief], which can be readily compared with Figs. 2-8 and 2-9 from the Basin Plan cited above. There is no valid basis in fact or law to distinguish the mass emission monitoring stations located in the Los Angeles River (S10) and San Gabriel River (S14) from those in the Santa Clara River (S29) and Malibu Creek (S02). Because the portions of the rivers in which those stations are located are not distinct bodies of water from the downstream segments into which they flow, the Ninth Circuit's ruling in this case is in direct conflict with this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). There, this Court held that if a

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[3] All referenced sections of the Basin Plan are available at: http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/basin_plan/basin_plan_documentation.shtml.

canal and adjacent impoundment area were "simply two parts of the same water body," then the flow of water from one into the other "cannot constitute an 'addition' of pollutants." Since the Clean Water Act defines the "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), the mere fact that pollutants already within the rivers at issue in this case are allowed to flow past the monitoring stations located in those rivers cannot be held to violate the Act's prohibition against "discharges" that are not in compliance with the District's permit.

In *Miccosukee* this Court found it necessary to remand that case to the Eleventh Circuit to determine whether the canal and the impoundment were "meaningfully distinct water bodies." Here, however, the record is clear that the pollutants observed at the S10 and S14 monitoring stations are simply flowing from upstream to downstream in the same bodies of water – the Los Angeles and San Gabriel Rivers. Consequently, because there has been no "addition" of a pollutant to those waters, and no "discharge of a pollutant" that is attributable to any particular outfall from the Petitioner's MS4, this Court should grant the Petition for Certiorari and reverse the decision of the court below.

II. IF NOT REVERSED, THE NINTH CIRCUIT'S OPINION WOULD THROW THE ENTIRE MUNICIPAL STORMWATER PROGRAM, AS WELL AS THE NPDES PERMIT PROGRAM IN GENERAL, INTO CONFUSION

Since the inception of the National Pollutant Discharge Elimination System ("NPDES") nearly forty years ago, the program as administered by U.S. EPA and delegated state agencies has focused on establishing, and monitoring compliance with, water quality-based and technology-based effluent limitations for each outfall through which a permittee discharges to the receiving waters. The term "outfall" is not defined in the Clean Water Act, the relevant statutory provisions refer only to a "point source" from which pollutants are "discharged." *See* 33 U.S.C. § 1362(12), (14) and (16). However, U.S. EPA's implementing regulations in 40 C.F.R. Part 122 consistently use the term "outfall" as the point at which limits are to be imposed and compliance is to be measured. For example, 40 C.F.R. § 122.45(a) states that "All permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility. . . ."

U.S. EPA's "NPDES Permit Writers' Manual," EPA-833-K-10-001 (September 2010)[4] states at 8-5 to

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[4] Available at: http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45.

8-6 that "[e]ffluent monitoring locations should provide a representative sample of the effluent being discharged into the receiving water. . . . Most importantly, the point where a final effluent limitation applies and the point where monitoring is required must be the same. A logical effluent monitoring point is just before discharge to the receiving water." EPA's general NPDES permit regulations do not contain a separate definition of "outfall," but its common meaning has long been well-understood by permitting authorities and the regulated community. For example, U.S. EPA's "NPDES Compliance Inspection Manual," EPA 305-X-04-001 (July 2004)[5] defines "Outfall" at 18-10 as a "Point source where an effluent is discharged into receiving waters." For purposes the MS4 program, however, EPA has promulgated a very specific definition of "Outfall." Pursuant to 40 C.F.R. § 122.26(b) ("Definitions"):

> (9) *Outfall* means a *point source* as defined by 40 C.F.R. § 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and ***does not include*** open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other ***conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States***. (Emphasis added.)

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[5] Available at: http://epa.gov/oecaerth/resources/publications/monitoring/cwa/inspections/npdesinspect/npdesmanual.html.

In holding that the pollutants detected at the monitoring stations in the Los Angeles and San Gabriel Rivers "had not yet exited the point source into navigable waters," the Ninth Circuit quotes only the first part of this definition, and omits the qualifying language highlighted above. Only by doing so was it able to reach the erroneous conclusion that a "discharge from a point source" occurred when polluted stormwater flowed "out of the concrete channels" and into the downstream portion of the Los Angeles and San Gabriel Rivers. Slip Op. at 9461. Having found the channelized portions of the rivers to be "point sources" rather than navigable waters, the court was then able to suggest that "the precise location of each outfall is ultimately irrelevant." *Id.*

If not reversed, the Ninth Circuit's holding that the river itself is both the point source and the outfall, so that WQS exceedances measured within the river are sufficient to impose liability on MS4 permittees without regard to the proximity of any actual outfalls from their systems, would wreak havoc in the administration of the MS4 permit program nationwide. In fact, it would throw a monkey wrench into the long-established approach to NPDES permitting and enforcement in general, which relies upon setting limits and measuring compliance for all permittees at the point of discharge from their outfalls into the receiving waters. The District Court decision reversed by the Ninth Circuit in this case properly emphasized the need to show that some amount of standards-exceeding pollutant is being discharged through at

least one District "outlet" or "outflow" or "outfall" into the receiving stream. *See* March 2, 2010 Order at 12-13; April 26, 2010 Order at 3.

The fundamental unfairness of the Ninth Circuit's decision is underscored by the fact that, in addition to the County and the District, there are 31 other municipalities directly or indirectly discharging stormwater to the Los Angeles River (identified as co-permittees in Appendix A of the permit), and the Fact Sheet for the permit reveals that there are another 1,327 direct or indirect dischargers covered by industrial stormwater permits, and 147 dischargers covered by construction stormwater permits. Fact Sheet/Staff Report at 12.[6] Similarly, on the San Gabriel River, in addition to the 29 municipal co-permittees, there are 549 industrial and 175 construction stormwater permittees. The Ninth Circuit would hold the District liable for the pollutants discharged by all of these permittees, regardless of whether they were transmitted through a portion of the MS4 operated by the District (i.e., its own pipes and outfalls, as opposed to the rivers themselves). Neither the permit in this case, nor the Clean Water Act and its state and federal implementing regulations can tolerate such a result.

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[6] Available at: http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/los_angeles_ms4/staffreportfactsheetfinal.pdf.

CONCLUSION

The Ninth Circuit's decision in this case decides an important federal question in a way that conflicts with relevant decisions of this Court. For each of the foregoing reasons, NAFSMA respectfully requests that the District's Petition for Certiorari be granted and that the decision of the Ninth Circuit, which has serious negative consequences for municipal storm-water permittees throughout the country, be reversed.

Respectfully submitted,

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Appendix

Los Angeles County 2006-07 Stormwater Monitoring Report, Fig. 2-1

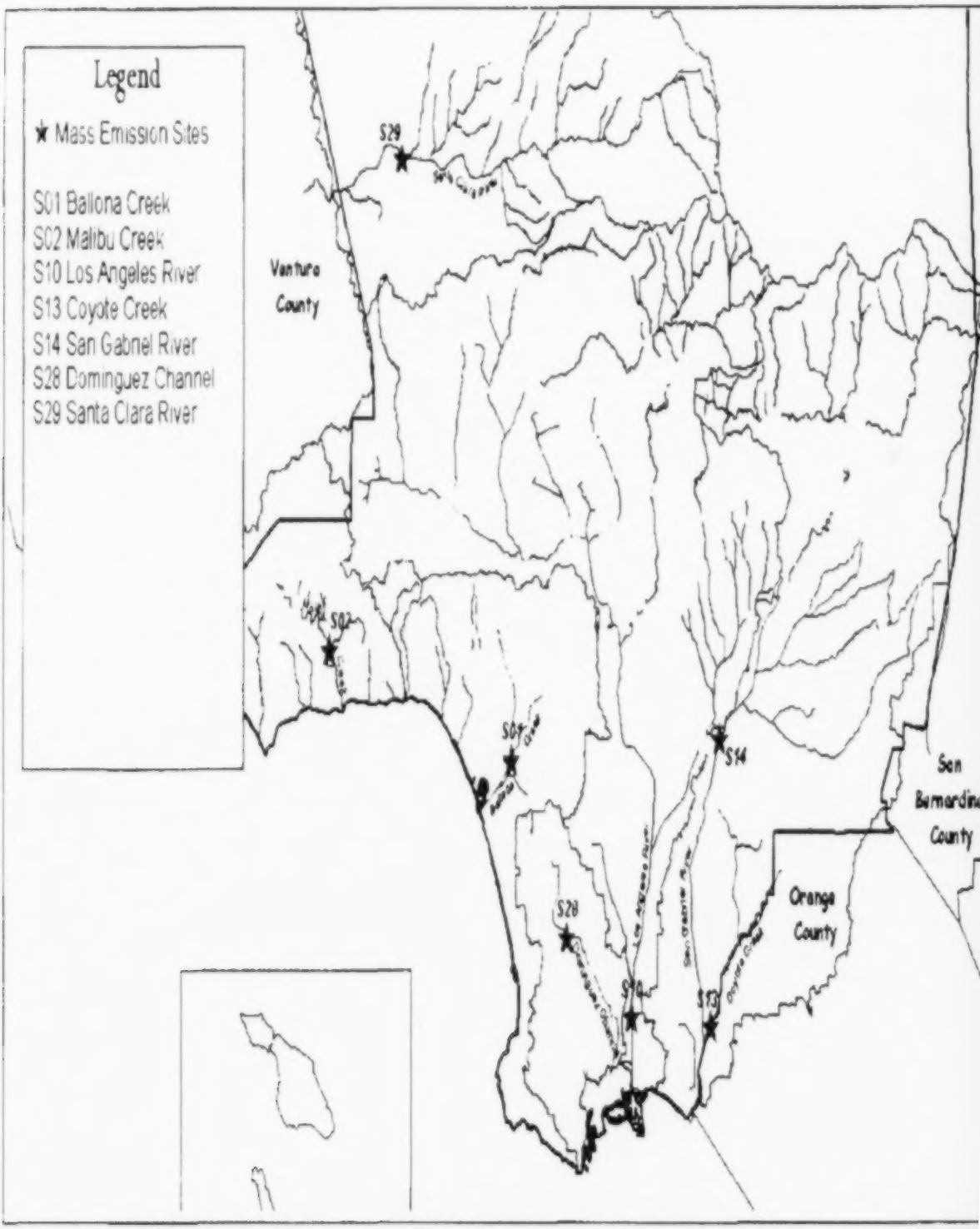

Figure 2-1
Mass Emission Sampling Sites

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-460

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, AND U.S. CONFERENCE OF MAYORS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

The *amici curiae* are as follows:

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* brief to this Court in cases, like this one, that raise issues of vital state concern.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating

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[1] The parties have consented to the filing of this *amici curiae* brief, and their letters of consent are on file with the Clerk. (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amici* made a monetary contribution to its preparation (Rule 37.6).

and developing the professional management of local governments throughout the world.

The Council of State Governments ("CSG") is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The *amici* represent various state and local government organizations that have an interest in the proper administration, implementation, and enforcement of the Clean Water Act ("CWA"). The CWA establishes the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the U.S. Environmental Protection Agency ("EPA")—or the states that have been authorized to administer their own NPDES programs—to exercise permit authority over discharges of pollutants from point sources into the waters of the United States. The Ninth Circuit's decision holds that municipal separate storm sewer systems ("MS4s"), which local governments generally operate, are subject to the same discharge prohibitions and requirements of the NPDES that apply to other NPDES-regulated dischargers. On the contrary, the same statutory prohibitions and requirements do not apply to MS4s. Rather than prohibiting MS4s from discharging pollutants except to the ex-

tent authorized by the NPDES, as in the case of other NPDES-regulated dischargers, the CWA instead provides that MS4s must meet best management practices by establishing "controls" and other management practices and techniques to "reduce" discharge of pollutants to the "maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). The Ninth Circuit decision, by requiring MS4s to actually prevent the discharge of pollutants into waterways in the same manner as other NPDES-regulated dischargers, has misconstrued the CWA and imposed an obligation on MS4s that the CWA does not impose. Thus, the Ninth Circuit's decision significantly affects state and local governments, and the *amici* have an interest in this case.

SUMMARY OF ARGUMENT

This *amici* brief makes the following arguments:

1. The Clean Water Act ("CWA") prohibits the "discharge of a pollutant," except as authorized by the CWA, and authorizes such a discharge pursuant to a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. §§ 1311(a), 1342(a). Although NPDES permit requirements apply to municipal separate storm sewer systems ("MS4s") in discharging polluted stormwater, the same prohibitions and requirements of the NPDES that apply to other NPDES-regulated dischargers do not apply to MS4s. Instead, the CWA provides that NPDES permits for MS4s shall establish "controls," including "management practices" and other techniques to "reduce" the discharge of pollutants "to the maximum extent practicable." *Id.* at § 1342(p)(3)(B). Thus, while other NPDES-regulated dischargers are prohibiting from discharging pollu-

tants that fail to meet effluent limitations established in the NPDES permit, MS4 operators are instead required to adopt best management practices to "reduce" pollution "to the maximum extent practicable." The Ninth Circuit erred in holding that the Los Angeles County Flood Control District's ("District") MS4 is subject to the same statutory prohibitions and requirements that apply to other point source discharges, and that the District's MS4 violated the CWA by discharging pollutants into waterways. The Ninth Circuit's decision adversely affects the states that administer their own NPDES programs and local governments that operate MS4s by requiring MS4s to comply with the same statutory prohibitions and requirements that apply to other dischargers.

2. Even assuming *arguendo* that the CWA imposes the same statutory prohibitions and requirements against MS4s as against other NPDES-regulated dischargers, the Ninth Circuit still misapplied the CWA. The CWA prohibits an unauthorized "discharge of a pollutant," 33 U.S.C. § 1311(a), which is defined as an "addition" of pollutants to "the waters of the United States" from a "point source," *id.* at §§ 1362(7), -(12). The Ninth Circuit held that the District's MS4 caused an "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations "detected" stormwater pollutants in the rivers, and the District's downstream "outfalls" "again discharged" the pollutants into the rivers. In fact, the monitoring stations and downstream "outfalls"—both of which are located in the rivers—have not caused an "addition" of pollutants to the rivers because the pollutants were already in the rivers before they reached these facilities. The Ninth Circuit decision adversely affects local governments that operate

MS4s by subjecting them to potential liability for "discharging" pollutants into waterways even though the pollutants were already in the waterways before they were ostensibly "discharged."

3. Further, the District's MS4 has not caused an "addition" of a pollutant to "the waters of the United States" under this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004). There, this Court held that a discharge of a pollutant from one water body into another water body does not constitute an "addition" of the pollutant to "the waters of the United States" if the two water bodies are not "meaningfully distinct." Although the Ninth Circuit held that the District's MS4 discharged pollutants from the monitoring stations and downstream "outfalls" into the Los Angeles and San Gabriel Rivers, the segments of the rivers above and below these facilities are not "meaningfully distinct," and thus there has been no "addition" of a pollutant to the "waters of the United States." Hence, the Ninth Circuit's decision conflicts with this Court's decision in *Miccosukee Tribe*. The Ninth Circuit's decision adversely affects state and local governments by subjecting them to liability under the CWA for discharging pollutants from and into water bodies that are not "meaningfully distinct," contrary to *Miccosukee Tribe*.

4. The District's MS4 also has not caused an "addition" of a pollutant to "the waters of the United States" under a recent regulation adopted by the U.S. Environmental Protection Agency ("EPA"). The regulation provides that the transfer of a pollutant from one water body to another water body does not constitute an "addition" of the pollutant to "the waters of the United States" within the meaning of

the CWA if both water bodies are classified as "the waters of the United States." 40 C.F.R. § 122.3(i). The Los Angeles and San Gabriel rivers are classified as "the waters of the United States" both above and below the monitoring stations and downstream "outfalls" where, according to the Ninth Circuit, the pollutants were "detected" and "again discharged" into the rivers. Thus, the Ninth Circuit decision conflicts with the EPA's regulation. It also adversely affects state and local governments by subjecting them to liability under the CWA for discharging pollutants from and into water bodies that are both classified as "the waters of the United States," contrary to the EPA regulation.

5. In enacting the CWA, Congress established the dual goals of (1) restoring and maintaining the chemical, physical, and biological integrity of the nation's waters, and (2) recognizing the states' "primary responsibilities and rights" to prevent and reduce water pollution and to "plan the development of land and water resources." 33 U.S.C. §§ 1251(a), -(b). The CWA thus is a partnership between the federal government and state and local governments in controlling water pollution. Most NPDES programs are administered by the states rather than the federal government. Currently 46 states have been authorized to administer their own NPDES programs. Under the CWA, the states are authorized not only to regulate point sources of pollution under the NPDES but also to regulate nonpoint sources of pollution under their own laws. Therefore, state and local governments have ample authority to regulate MS4s both under the NPDES and under their own laws. Regardless of the extent to which MS4s are subject to regulation under the CWA, MS4s are

subject to significant regulation under state and local laws.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT IMPOSE THE SAME PROHIBITIONS AND REQUIREMENTS AGAINST MUNICIPAL SEPARATE STORM SEWER SYSTEMS THAT IT IMPOSES AGAINST OTHER REGULATED DISCHARGERS.

The Ninth Circuit held that the Los Angeles County Flood Control District ("District"), in operating its municipal separate storm sewer system ("MS4"),[2] violated the Clean Water Act ("CWA") because the MS4 discharged stormwater pollutants that "exceeded" water quality standards into the Los Angeles and San Gabriel Rivers, thus "allowing untreated and heavily-polluted stormwater to flow unabated from the MS4 into the Watershed Rivers . . . ." *NRDC v. County of Los Angeles*, 673 F.3d 880, 885, 889-90, 891-92 (9th Cir. 2011) (hereinafter "*NRDC*"). The Ninth Circuit stated that an MS4 is not treated "differently" under the CWA from other sources of pollution, *id.* at 895, and is not subject to a "less rigorous or enforceable regulatory scheme," *id.* at 894. The Ninth Circuit thus held that MS4s are subject to the same statutory prohibitions and re-

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[2] A "[m]unicipal separate storm sewer" is "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that is owned or operated by a state or local agency and "[d]esigned or used for collecting or conveying storm water," other than a publicly owned treatment work. 40 C.F.R. § 122.26(b)(8). Thus, an MS4 is a "system" of such sewers that collect or convey stormwater.

quirements that apply to others whose discharges are regulated by the CWA. On the contrary, the same statutory prohibitions and requirements do not apply to MS4s.

Section 301(a) of the CWA prohibits "the discharge of any pollutant" except as authorized by the CWA. 33 U.S.C. § 1311(a). One of the provisions for which an exception is provided is section 402, which establishes the National Pollutant Discharge Elimination System ("NPDES"). Under the NPDES, the U.S. Environmental Protection Agency ("EPA") is authorized to issue a permit for the "discharge of a pollutant." *Id.* at § 1342(a). An NPDES permit typically establishes "effluent limitations" for discharges of pollutants. 33 U.S.C. §§ 1311(e), 1342(a)(1); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-29 (9th Cir. 2002). Thus, section 301 prohibits an unauthorized discharge of a pollutant, and section 402 authorizes such a discharge pursuant to an NPDES permit, which typically establishes effluent limitations.

States are authorized to issue NPDES permits in lieu of the EPA if the state adopts an NPDES program that meets federal standards and is approved by the EPA. 33 U.S.C. § 1342(b); *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). To date, 46 states have been authorized to administer their own NPDES programs.[3] Thus, the states rather than the EPA primarily administer the NPDES nationwide.

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[3] All states except Idaho, Massachusetts, New Hampshire, and New Mexico have EPA-approved NPDES programs. *State Program Status*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/statestats.cfm (last visited Aug. 15, 2012).

The phrase "discharge of a pollutant," as used in sections 301(a) and 402(a) and elsewhere in the CWA, is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The word "addition" is not defined in the CWA. The term "navigable waters" is defined as "the waters of the United States," *id.* at § 1362(7), but the latter term is not defined. *Rapanos v. United States*, 547 U.S. 715, 723-29 (2006) (plurality opinion).[4] Thus, the Act prohibits an unauthorized "addition" of a pollutant to "the waters of the United States" from a point source, however the quoted terms are defined.

The Water Quality Act of 1987 provides that NPDES permit requirements apply to industrial and municipal discharges of stormwater. 33 U.S.C. § 1342(p). The 1987 Act, however, establishes different NPDES standards for industrial stormwater discharges and MS4 stormwater discharges. The 1987 Act provides that permits for industrial stormwater discharges "shall meet all applicable provisions of this section [section 402] and section [301] of this title." *Id.* at § 1342(p)(3)(A). On the other hand, the Act provides that permits for MS4 discharges "shall require *controls* to *reduce* the discharge of pollutants to the *maximum extent practicable*, including *management practices*, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State deter-

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[4] The *Rapanos* plurality opinion stated that the phrase "the waters of the United States" includes only "relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732 (plurality opinion). Justice Kennedy's concurring opinion argues that the phrase also includes non-navigable wetlands that have a "significant nexus" to navigable waters. *Id.* at 760-61, 779 (Kennedy, J., concurring).

mines appropriate for the control of such pollutants." *Id.* at § 1342(p)(3)(B)(iii) (emphasis added).

Thus, while the 1987 Act provides that industrial stormwater dischargers "shall meet all applicable requirements" of sections 301 and 402—which as noted above collectively prohibit the "discharge of a pollutant" except as authorized by an NPDES permit—the 1987 Act does not provide that MS4 stormwater dischargers must meet the same requirements. Instead, it provides that MS4s must establish "controls," including "management practices" and other "techniques" and "methods," to "reduce" the discharge of pollutants "to the maximum extent practicable." In effect, Congress imposed statutory prohibitions against industrial stormwater discharges that do not meet water quality standards but did not impose the same statutory prohibitions against MS4s. Congress required only that MS4s meet statutorily-defined best management practices in discharging stormwater pollutants. Since Congress imposed specific statutory prohibitions against industrial stormwater discharges but not against MS4 stormwater discharges, Congress made clear that MS4 discharges are not subject to the same statutory prohibitions that apply to industrial stormwater discharges and other NPDES-regulated discharges. When Congress enacts a statute that imposes an obligation on one category of persons but not against another category of persons, Congress presumptively does not intend that the obligation apply to the latter category. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (applying *expressio unis est exclusio alterius* principle in construing statute); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) (same).

MS4s are still subject to regulation under the NPDES. The EPA has described several best management practices that MS4s should utilize in "reduc[ing]" discharges of polluted stormwater "to the maximum extent practicable." These management practices provide the basis for conditions in NPDES permits for MS4 stormwater discharges. The EPA described several such management practices in adopting regulations to implement the 1987 Act. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,052 (Nov. 16, 1990) (hereinafter "55 Fed. Reg."). These management practices include, for example, measures to reduce pollutants in runoff from commercial and residential areas, *id.* at 48,054; measures to prevent illicit discharges (i.e., non-stormwater discharges entering the MS4s), *id.* at 48,055; measures to reduce discharges from municipal landfills and other areas, *id.* at 48,056; measures to reduce runoff from construction sites, *id.* at 48,058; and measures to assess the controls, *id.*

In addition, the EPA has adopted a "National Menu of Stormwater Best Management Practices," which describes best management practices for six categories of Stormwater Phase II: public education, public involvement, illicit discharge detection and elimination, construction, post-construction, and pollution prevention/good housekeeping. *National Menu of Stormwater Best Management Practices*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm (last visited Aug. 15, 2012).[5] Thus, the EPA has ensured that

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[5] To provide a concrete example of one such best management practice, the management practice for construction sites "dis-

MS4s are subject to extensive regulation under the NPDES, by describing several best management practices that MS4s should meet as a condition for their NPDES permits.

The Ninth Circuit's view that MS4 stormwater discharges are subject to the same statutory prohibitions and requirements that apply to industrial stormwater discharges and other NPDES-regulated discharges is incorrect. Rather than *prohibiting* MS4 stormwater discharges unless they comply with sections 301 and 402, as in the case of industrial stormwater discharges and other NPDES-regulated discharges, the CWA instead requires MS4 operators to apply best management practices to "reduce" stormwater pollution "to the maximum extent practicable." 33 U.S.C. § 1342(p)(3)(B). If an MS4 operator applies such best management practices, it is in compliance with the CWA, regardless of whether the MS4 actually discharges stormwater pollutants into waterways. Nothing in the 1987 Act prohibits, or can be construed as prohibiting, an MS4 from discharging stormwater pollutants into waters. Therefore, the Ninth Circuit's conclusion that the District violated the CWA because its MS4 "allow[ed] untreated and heavily-polluted stormwater to flow unabated from

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turbing one or more acres" must include development of "[r]equirements to implement erosion and sediment control best management practices (BMPs), [r]equirements to control other waste at the construction site, [p]rocedures for reviewing construction site plans, [p]rocedures to receive and consider information submitted by the public, and [p]rocedures for inspections and enforcement of stormwater requirements at construction sites." *Construction Site Stormwater Runoff Control*, ENVIRONMENTAL PROTECTION AGENCY, http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action+min_measure&min_measure_id=4 (bullets deleted) (last visited Aug. 15, 2012).

the MS4 into the Watershed Rivers," *NRDC*, 673 F.3d at 885, misconceives the CWA. The Ninth Circuit imposed an obligation on the District's MS4 that the CWA itself does not impose, and that is inconsistent with the CWA.

By not imposing the same prohibitions and requirements against MS4 stormwater discharges that it imposed against other NPDES-regulated discharges, Congress recognized that the entities responsible for the latter discharges generally are able to prevent the discharge of pollutants into waterways, but that MS4 operators generally have more difficulty doing so. An industrial discharger, for example, can decide whether to discharge its untreated industrial waste into a waterway, or instead treat the waste before discharging it. By contrast, local governments operating MS4s generally do not have the same control over discharges of stormwater pollutants into waterways. Stormwater is caused by high precipitation events over which the local government has no control, and typically accumulates on property, such as parking lots and shopping malls, which the local government does not own or control. The stormwater typically picks up pollutants, such as oil, toxic chemicals, and heavy metals. The MS4 prevents the flooding of property by collecting and channeling the stormwater through drains, culverts, and other conduits into downstream waterways. Although the MS4 may substantially reduce the pollutants in the stormwater, it often cannot eliminate the pollutants altogether, simply because of the large volume of stormwater entering the MS4 during high precipitation events occurring over short periods of time. In essence, a local government operating an MS4 performs a public service by collecting and channeling the stormwater and preventing local flooding.

A local government operating an MS4—in adopting "controls" and "management practices" to "reduce" stormwater pollutants "to the maximum extent practicable"—typically selects the controls and practices that best serve the needs of the local community, taking into account such factors as the local infrastructure, the frequency of flooding, and the pollutants in the stormwater, among other factors. These local government practices often are highly effective in reducing pollutants in stormwater, even though they may not always eliminate the pollutants altogether. Under the Ninth Circuit's view, local governments operating MS4s potentially would be required to cease discharging pollutants from MS4s altogether, which is unrealistic, or required to seek different and additional kinds of NPDES permits, which would be burdensome to local governments and highly costly to them and, ultimately, local taxpayers. The states that administer their NPDES programs would, in turn, bear substantial additional costs and burdens in administering and enforcing expanded NPDES programs in the stormwater context. The CWA's more practical and limited goal is not to prohibit MS4s from discharging stormwater pollutants altogether but instead to encourage local governments to improve their MS4 facilities by best management practices and reduce stormwater pollution to the extent feasible.

The EPA recognized this limited congressional goal in adopting regulations implementing the 1987 Act, stating:

> When enacting this provision [section 402(p)], Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe

> treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system "permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge." [Vol. 132, Cong. Rec. S16425 (daily ed. Oct. 16, 1986)].
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> A shift towards comprehensive storm water quality management programs to reduce the discharge of pollutants from municipal separate storm sewer systems is appropriate for a number of reasons. First, discharges from municipal storm sewers are highly intermittent, and are usually characterized by very high flows occurring over relatively short time intervals . . . . Second, the nature and extent of pollutants in discharges from municipal systems will depend on the activities occurring on the lands which contribute runoff to the system. Municipal separate storm sewers tend to discharge runoff drained from lands used for a wide variety of activities. Given the material management problems associated with end-of-pipe controls, management programs that are directed at pollutant sources are often more practical than relying solely on end-of-pipe controls.

55 Fed. Reg. at 48,037-38.

The District's MS4 permit, read in light of the statutory language, does not support the Ninth Circuit's conclusion that the District's MS4 is violating the permit. The permit, as described by the Ninth

Circuit, provides that "[d]ischarges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited," and that "[d]ischarges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for [sic], shall not cause or contribute to a condition of nuisance." *NRDC*, 673 F.3d at 892. These provisions, properly interpreted, require only that the District not take action for which it is "responsible" that "cause[s] or contribute[s] to" water quality violations or conditions of nuisance. Thus, the District may be liable for a violation if, through some action of its own, it causes more pollutants to be in the stormwater than were already in the stormwater prior to its entry into the District's MS4. The District would *not* be liable for a violation, however, if the District does *not*, through its own action, cause more pollutants to be in the stormwater. In the latter instance, the District has not "cause[d] or contribute[d] to" water quality violations, and thus has not violated its permit. If the permit were construed otherwise—as subjecting the District to liability under the CWA even though the District has not caused additional pollutants to be included in the stormwater—the permit would be inconsistent with the CWA. As explained above, the CWA does not impose liability on an MS4 operator simply because the MS4 discharges stormwater pollutants into waterways.

II. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO WATERWAYS FROM A "POINT SOURCE."

We now assume *arguendo*—contrary to the express provision of CWA section 402(p)—that the same CWA prohibitions and requirements that apply to NPDES-

regulated discharges also apply to MS4 stormwater discharges. Under this assumption, the Ninth Circuit still misapplied the CWA because the District's MS4 has not caused an "addition" of pollutants to waterways from a "point source."

The Ninth Circuit held that the District's MS4 caused an "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations, which measure stormwater pollutants and are located in the rivers "detected" that stormwater pollutants were exceeding water quality standards, and, after the pollutants exited the monitoring stations, they were "again discharged" into the rivers through downstream "outfalls."[6] Since the District "controlled" the pollutants when they were measured at the monitoring stations and "again discharged" through the downstream "outfalls," the District "caused or contributed to" a violation of water quality standards. *NRDC*, 673 F.3d at 899-900. In short, the Ninth Circuit held that the District caused an "addition" because it had "control" of the pollutants when they were measured at the monitoring stations and later discharged from the "outfalls," both events occurring within the Los Angeles and San Gabriel Rivers.

The Ninth Circuit's analysis and conclusion were fundamentally wrong. The stormwater pollutants were already in the Los Angeles and San Gabriel

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[6] Although the Ninth Circuit extensively described the mass emissions monitoring stations, the Ninth Circuit did not describe the downstream "outfalls" through which the pollutants were "again discharged" into the watershed rivers. Since the pollutants were already in the rivers prior to their entry into the "outfalls," the "outfalls" presumably had no effect in regulating or controlling the pollutants.

Rivers when they entered the District's mass emissions monitoring stations and, later, when they entered and were "again discharged" by the downstream "outfalls." Thus, the monitoring stations and downstream "outfalls" did not cause the "addition" of pollutants or anything else to the rivers because any pollutants were already in the rivers before they reached these facilities. If any pollutants were "added" to the rivers, they were added at the District's *upstream* outfalls, where any pollutants were *initially* discharged from the District's MS4 into the rivers. Under the EPA's stormwater regulations, an "outfall" is a "point source," and is "the point where a municipal separate storm sewer discharges to waters of the United States." 40 C.F.R. § 122.26(b)(9). Therefore, while the District's *upstream* outfalls may have "added" pollutants to the rivers, assuming that pollutants were added, the District's monitoring stations and *downstream* "outfalls" did not "add" any pollutants to the rivers because the pollutants were already in the rivers before they reached these facilities. Under the Ninth Circuit decision, a local government operating an MS4 would be responsible for all upstream pollution even if it is not from an upstream point source.

The Ninth Circuit apparently concluded that the prohibited "discharge" of pollutants occurred at the *downstream* "outfalls" located in the rivers—rather than at the *upstream* outfalls where the pollutants, if any, were initially discharged into the rivers—because of the difficulty and inconvenience of establishing that the pollutants were actually discharged at the upstream outfalls. As the Ninth Circuit put it, the plaintiffs would face a "Sysyphean task" in trying to prove that water quality violations were occurring at the upstream outfalls, and, since there is

"no dispute" that the District's MS4 added polluted stormwater to the watershed rivers, the "precise location" of the District's outfalls is "irrelevant." *NRDC*, 673 F.3d at 899-900.

On the contrary, the "precise location" of an outfall is critical in determining whether an MS4 has caused an "addition" of pollutants to a waterway within the meaning of the CWA, because any such "addition" can only have occurred at the outfall where the pollutants were initially discharged into the waterway. If the pollutants were already in the waterway when they were ostensibly "discharged," the supposed discharge did not cause an "addition" of the pollutants to the waterway. Although the Ninth Circuit failed to appreciate this point, the district court fully understood it, stating that "[o]utflow" from the District's "upstream outlets would be considered discharges under the Permit and the Clean Water Act" but "there is no data showing that any of these upstream discharges by the District are causing or contributing to the violations of the Water Quality Standards." Pet. App. 120. Although it may be difficult and inconvenient to determine whether the District's MS4 discharged pollutants exceeding water quality standards at the upstream outfalls, the difficulty and inconvenience of this inquiry provides no basis for departing from statutory requirements.

Indeed, it is doubtful that the District's monitoring stations and downstream "outfalls" are even "point sources" within the meaning of the CWA, apart from the fact that they have not caused an "addition" of pollutants to the rivers. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance," including a "pipe, ditch, channel, tunnel, conduit," among other facilities, "*from which* pollu-

tants are or may be *discharged*." 33 U.S.C. § 1362(14) (emphasis added). Thus, a point source is not merely a conveyance, but is a conveyance "from which" pollutants are "discharged." The "discharge" of a pollutant "from" a facility connotes that the facility must have *caused* the discharge of pollutants in some manner, rather than merely served as a conduit through which the pollutants pass without being regulated or controlled—just as, for example, a discharge from military service or employment connotes that the discharging agency must in some manner have caused the discharge.

If the conclusion were otherwise—that is, if a "point source" were any conveyance through which pollutants might pass without being regulated or controlled—an unregulated and unimpeded flow of polluted water through a series of pipes or conduits located in navigable waterways would require a separate NPDES permit for each pipe or conduit. Congress obviously did not intend such an absurd result, which would be costly and burdensome for state and local governments. Thus, the CWA requires an NPDES permit for the *initial* discharge of a pollutant into waters of the United States, 40 C.F.R. § 122.26(b)(9), but does not require a separate permit each time that the pollutant thereafter flows through a pipe or other conveyance. Since the District's monitoring stations and downstream "outfalls" did not regulate or control the flow of stormwater pollutants, these facilities cannot be properly considered "point sources" within the meaning of the CWA, apart from the fact that they did not cause an "addition" of pollutants to the rivers.

The Ninth Circuit also attached significance to this Court's decision in *South Florida Water Management*

District v. Miccosukee Tribe, 541 U.S. 95 (2004), which held that a point source may cause an "addition" of pollutants within the meaning of the CWA even though the point source is not the "original source" of the pollutants. *Miccosukee Tribe*, 541 U.S. at 105; *NRDC*, 673 F.3d at 900. The fact that a point source may cause an "addition" even though it is not the original source of the pollutants does not mean that anything that flows through a point source is an "addition." Rather, if the pollutants are already in the water body before they enter the point source and remain in the water body after they exit from the point source, the point source has not caused an "addition" of the pollutants to the water body, regardless of where the pollutants originated.

Although the Ninth Circuit held that the District's putative "control" of the stormwater at the monitoring stations and downstream "outfalls" demonstrated that the District was liable for violating the CWA, *NRDC*, 673 F.3d at 900-01, an MS4 operator does not have "control" over stormwater discharges in the same way that other dischargers have control over other types of discharges. A typical industrial or municipal discharger has control over the discharge of untreated waste into waterways because the discharger can decide whether to discharge the untreated waste or instead treat the waste before discharging it. An MS4 operator does not have the same kind of control over the discharge of polluted stormwater, even though the MS4 may be subject to local regulations as a condition of its NPDES permit. Stormwater is commonly generated by short interval, high precipitation events that are beyond the control of the MS4 operator, and the stormwater generally flows from lands the MS4 operator has no control over. The MS4 collects and channels the stormwater

in order to prevent local flooding, and, in compliance with best management practices, it removes as many pollutants as possible from the stormwater before discharging it into downstream waterways. In adopting its stormwater regulations, the EPA recognized that stormwater discharges cause many water quality impacts that are beyond the control of MS4 operators, stating:

> The water quality impacts of discharges from municipal separate storm sewer systems depend on a wide range of factors including: the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of the land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharges to receiving water flow.

55 Fed. Reg. at 48,038. All of these factors, except possibly for the "presence of illicit connections," are beyond the control of MS4 operators. Thus, contrary to the Ninth Circuit decision, MS4 operators do not have the same "control" over stormwater discharges that other dischargers have over other types of discharges, and there is no basis for subjecting them to liability under the CWA because of their putative "control."

III. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO "THE WATERS OF THE UNITED STATES" BECAUSE THE SEGMENTS OF THE RIVERS ABOVE AND BELOW THE MONITORING STATIONS AND DOWNSTREAM "OUTFALLS" ARE NOT "MEANINGFULLY DISTINCT."

The Ninth Circuit erred not only in holding that the District's MS4 caused an "addition" of pollutants from a "point source," but also in holding that the pollutants caused an "addition" of pollutants to "the waters of the United States." The CWA prohibits an unauthorized discharge only if the discharge causes an "addition" of pollutants to "navigable waters," a term defined as "the waters of the United States." 33 U.S.C. §§ 1311(a), 1342(a), 1362(7), -(12).

The Ninth Circuit reasoned that the District's MS4 caused the "addition" of pollutants to the Los Angeles and San Gabriel Rivers because the District's mass emissions monitoring stations "detected" stormwater pollutants in the rivers, and the pollutants were thereafter "again discharged" into the rivers as they passed through the downstream "outfalls." *NRDC*, 673 F.3d at 899-900. The court failed to determine, however, whether the segments of the rivers above and below the monitoring stations and downstream "outfalls" were the same bodies of water or different bodies of water, and apparently attached no significance to the question. On the contrary, the question of whether these segments of the rivers were the same or different bodies of water is critical in determining whether the District's MS4 has caused an "addition" of the pollutants to "the waters of the United States."

In *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), this Court held that the discharge of a pollutant from a point source does not cause an "addition" of the pollutant to "the waters of the United States" within the meaning of the CWA if the water body *into* which the pollutant is discharged is not "meaningfully distinct" from the water body *from* which the pollutant is discharged. *Miccosukee Tribe*, 541 U.S. at 112. As the Court put it, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110, quoting *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001).

The Court did not decide whether the two water bodies in that case were "meaningfully distinct," and remanded that issue to the lower courts for further consideration. *Miccosukee Tribe*, 541 U.S. at 111. Nonetheless, the Court established the principle that a discharge does not cause an "addition" of a pollutant to "the waters of the United States" if the water bodies are not "meaningfully distinct." This Court and the Eleventh Circuit have so interpreted this Court's decision in *Miccosukee Tribe* in subsequent cases. *S.D. Warren v. Maine Board of Environmental Quality*, 547 U.S. 370, 381 (2006) (*Miccosukee Tribe* "accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants.'"); *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1216 n.4 (11th Cir. 2009) ("The permitting requirement does

not apply unless the bodies of water are meaningfully distinct," citing *Miccosukee Tribe*, 541 U.S. at 112).

Miccosukee Tribe's holding that a discharge does not cause an "addition" of a pollutant if the water bodies are not "meaningfully distinct" is consistent with pre-*Miccosukee Tribe* federal circuit authority. Prior to *Miccosukee Tribe*, the First, Second, Sixth, and District of Columbia Circuits held that a facility does not cause an "addition" of a pollutant within the meaning of the CWA unless the pollutant is added from "the outside world," that is, from a different water body from the one to which the pollutant has been added. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165, 175 (D.C. Cir. 1982); *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988). In *Gorsuch*, for example, the District of Columbia Circuit held that a dam—even though it is a "point source" that may generate pollutants that reach downstream waters—does not cause an "addition" of pollutants to the downstream waters because "the dam-caused pollution merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)." *Gorsuch*, 693 F.2d at 165, 174-83. As the court put it, an "addition" from a point source occurs "only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175.

Thus, under *Miccosukee Tribe* and pre-*Miccosukee Tribe* federal circuit authority, a point source does not cause an "addition" of a pollutant to "the waters of the United States" if the pollutant is not conveyed

from the "outside world." A pollutant is conveyed from the "outside world" only if the water bodies from which and to which the pollutant is conveyed are "meaningfully distinct."

Here, the Los Angeles and San Gabriel Rivers above and below the District's monitoring stations and downstream "outfalls" are part of the same continuously flowing body of water, and are not "meaningfully distinct." These waterways are navigable, as the Ninth Circuit acknowledged, *NRDC*, 673 F.3d at 898, and their navigability does not change as they flow through these facilities. In the vernacular of *Gorsuch*, *Catskill*, *Dubois*, and *Consumers Power*, the District's MS4 has not "added" pollutants from the "outside world." So, applying the *Missosukee Tribe* analogy, the ladled soup has not been added to another pot. Therefore, the District's MS4 has not caused an "addition" of pollutants to "the waters of the United States."

Under the Ninth Circuit's decision, a local government that operates an MS4 would be required to obtain an NPDES permit for facilities in a waterway that simply measure pollutants passing through, even though the character of the waterway does not change as the pollutants pass through the facilities. *Miccosukee Tribe* plainly holds that the CWA does not require NPDES permits in such cases. The Ninth Circuit decision, in holding otherwise, is flatly inconsistent with *Miccosukee Tribe*.

IV. THE DISTRICT'S MS4 HAS NOT CAUSED AN "ADDITION" OF POLLUTANTS TO "THE WATERS OF THE UNITED STATES" BECAUSE THE SEGMENTS OF THE RIVERS ABOVE AND BELOW THE MONITORING STATIONS AND DOWNSTREAM "OUTFALLS" ARE BOTH CLASSIFIED AS "THE WATERS OF THE UNITED STATES."

The Ninth Circuit not only failed to determine whether the Los Angeles and San Gabriel Rivers above and below the monitoring stations and downstream "outfalls" are "meaningfully distinct," as required by *Miccosukee Tribe*, but also failed to determine whether the rivers above and below these facilities are both classified as "the waters of the United States." This distinction is crucial because the EPA has adopted a regulation providing that a transfer of a pollutant from one water body to another does not constitute an "addition" of a pollutant to "the waters of the United States" if both water bodies are classified as "the waters of the United States." 40 C.F.R. § 122.3(i).

The EPA regulation, entitled the Water Transfers Rule, clarifies the meaning of the phrase—"addition" of a "pollutant" to "the waters of the United States" from a "point source"—that triggers the applicability of the NPDES. 33 U.S.C. § 1362(12); 73 Fed. Reg. 33,697 (June 13, 2008) (hereinafter "73 Fed. Reg."). The regulation provides that a transfer of water containing a pollutant from one part of "the waters of the United States" to another part of similarly-classified waters does not constitute an "addition" of a pollutant to "the waters of the United States" because the pollutant is merely being moved around

within "the waters of the United States" rather than being added to such waters. 40 C.F.R. § 122.3(i). Specifically, the EPA regulation provides:

> The following discharges do not require NPDES permits:
>
> . . . .
>
> (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer itself to the water being transferred.

Id. Explaining the Rule, the EPA stated:

> [W]hen a pollutant is conveyed along with, and already subsumed entirely within, navigable waters and the water is not diverted for an intervening use, the water never loses its status as "waters of the United States," and thus nothing is added to those waters from the outside world.
>
> The Agency has concluded that, taken as a whole, the statutory language and structure of the Clean Water Act indicate that Congress generally did not intend to subject water transfers to the NPDES program . . . . Instead, Congress intended to leave primary oversight of water transfers to state authorities in cooperation with Federal authorities.

73 Fed. Reg. at 33,701 (citation omitted).

Under the EPA regulation, if water containing a pollutant is transferred from one part of "the waters

of the United States" to another part of similarly-classified waters, and if there is no "intervening industrial, municipal, or commercial use," and if the water transfer does not "introduce[]" pollutants, the water transfer does not cause the "addition" of a pollutant to "the waters of the United States," and the NPDES permit requirements do not apply. The EPA regulation is entitled to deference under the *Chevron* doctrine, which requires deference to an agency's permissible interpretation of an ambiguous statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011). The Eleventh Circuit recently applied *Chevron* deference in upholding the EPA regulation in the context of water transfers in the Florida Everglades. *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1218-28 (11th Cir. 2009).

The EPA regulation generally adopts the approach, advanced by the United States in other contexts, that all navigable water bodies in the nation are part of a "unitary water body," and that the movement of a pollutant within this "unitary water body" does not cause the "addition" of a pollutant because the pollutant is already in the water body. Indeed, the United States asserted its "unitary water body" approach before this Court in *Miccosukee Tribe*. Brief for the United States, *South Florida Water Management District v. Miccosukee Tribe*, 15-20, No. 02-626 (Sept. 2003). This Court declined to consider the argument because it had not been presented to or addressed by the lower courts, and the Court remanded this issue to the lower courts for further consideration. *Miccosukee Tribe*, 541 U.S. at 105-08, 112. The Court commented, however, that the United States' "uni-

tary waters" approach is not supported by "any administrative documents in which EPA has espoused that position," and that the United States' argument could "conflict with current NPDES regulations." *Miccosukee Tribe*, 541 U.S. at 107. Since the EPA has now adopted a regulation that adopts the "unitary water body" approach, the United States' approach is supported by EPA regulations and does not conflict with such regulations, and, as explained above, the EPA's regulation is entitled to deference under *Chevron*.

The EPA's Water Transfers Rule is relevant in light of the Ninth Circuit's construction of how the District's MS4 caused the "discharge of a pollutant." The Ninth Circuit held that the stormwater pollutants in the Los Angeles and San Gabriel Rivers, after entering and exiting the District's monitoring stations, were "again discharged" into the rivers by the downstream "outfalls." *NRDC*, 673 F.3d at 899. If, as the Ninth Circuit reasoned, the pollutants were "again discharged" by the downstream "outfalls," then these "outfalls" transferred the pollutants from the upper segment of the rivers to the lower segment of the same rivers—and hence the EPA's Water Transfers Rule applies. Since both rivers are the part of the same, continuously flowing waterway both above and below the facilities, and since the character of the rivers does not change as they pass through the facilities, the rivers above and below the facilities both consist of "the waters of the United States." Thus, the District's MS4 has not caused an "addition" of a pollutant to "the waters of the United States" under the EPA regulation.

Therefore, the Ninth Circuit's decision is not only inconsistent with *Miccosukee Tribe* because the Los

Angeles and San Gabriel Rivers above and below the monitoring stations and downstream "outfalls" are not "meaningfully distinct," but is also inconsistent with the EPA's Water Transfers Rule because the rivers both above and below these facilities are both classified as "the waters of the United States." The Ninth Circuit decision adversely affects the interests of state and local governments, by requiring that state governments that administer their own NPDES systems, and local governments that operate MS4s, must issue and obtain NPDES permits, respectively, for facilities in a continuously flowing waterway classified as "the waters of the United States," even though the character of the waterway does not change as it flows through the facilities.

V. EVEN THOUGH THE CLEAN WATER ACT DOES NOT IMPOSE THE SAME PROHIBITIONS AND REQUIREMENTS AGAINST MS4 DISCHARGES THAT IT IMPOSES AGAINST OTHER DISCHARGES, MS4s ARE SUBJECT TO EXTENSIVE REGULATION UNDER STATE AND LOCAL LAWS.

This *amici* brief has argued that MS4 discharges are not subject to the same prohibitions and requirements of the CWA that apply to other NPDES-regulated discharges, and, moreover, that the District's MS4 has not caused an "addition" of pollutants from a "point source" or to "the waters of the United States" under the circumstances of this case. Nonetheless, MS4s, including the District's MS4, are subject to extensive regulation under state and local laws. Indeed, state and local regulation of MS4s is fully consistent with, and in fact effectuates, Congress' stated goals in enacting the CWA.

The CWA's primary goals are twofold: first, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and, second, to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and "to plan the development . . . of land and water resources," *id.* at § 1251(b). Thus, the CWA not only provides for improvement of water quality but also provides that the states play an important role in achieving that goal and in regulating land and water use. The CWA does not establish unitary federal control over water pollution but instead implements principles of federalism in achieving such control. As mentioned in section IV, the EPA's Water Transfers Rule itself recognizes the important role that the states play, stating that "Congress intended to leave primary oversight over water transfers to state authorities in cooperation with Federal authorities." 73 Fed. Reg. at 33,701.

The CWA contains several provisions recognizing the essential role the states play in controlling water pollution and regulating land and water use. The CWA authorizes the states to administer their own NPDES programs, subject to the EPA's approval. 33 U.S.C. § 1342(b). Indeed, the nation's NPDES programs are primarily administered by the states rather than the EPA. To date, 46 states have been authorized to administer their NPDES programs.[7] The CWA also provides that the states are authorized under their own laws to regulate nonpoint sources of pollution, which are not regulated by the NPDES. 33 U.S.C. §§ 1288, 1314(f), 1319. The states' authority

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[7] ENVIRONMENTAL PROTECTION AGENCY, *supra* note 3.

to regulate nonpoint sources of pollution ensures that pollution is still regulated even though it is not regulated by the NPDES. While the CWA authorizes regulation only of "navigable waters," *id.* at §§ 1362(12), 1311(a), which are nebulously defined as "the waters of the United States," *id.* at § 1362(7), the states are authorized to regulate all water bodies within their jurisdictions—both navigable and non-navigable—under their own laws. Although the U.S. Constitution's Commerce Clause, U.S. Const. art. I § 8, cl.3, authorizes the federal government only to regulate waters that are navigable—a power that this Court has broadly defined, *e.g.*, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940); *United States v. Rio Grande Dam & Irrigation* Co., 174 U.S. 690 (1899)—the Commerce Clause limitation does not apply to the states. Thus, even though the CWA requires MS4s to apply best management practices and does not prohibit them from discharging pollutants into waterways, 33 U.S.C. § 1342(p)(3)(B)(iii), the states are free to adopt other regulations—including more stringent regulations—applicable to MS4s, based on local circumstances and conditions. The CWA specifically provides that the states may adopt "any standard or limitation respecting discharges of pollutants" that are not "less stringent" than federal standards and requirements. *Id.* at § 1370.

In addition, the CWA authorizes the states to adopt water quality standards for bodies of water, which are separate from NPDES-established effluent limitations for individual discharges into such waters. *Id.* at § 1313. Thus, the states can adopt ambient water quality standards for entire water bodies, and not just effluent limitations for individual discharges into the water bodies.

The CWA—beyond recognizing the states' "primary responsibilities and rights" to "plan" the development of "land and water resources," 33 U.S.C. § 1251(b)—specifically limits its intrusion into the states' traditional authority to regulate land use and water use. The CWA provides that the statute does not impair or affect "any right or jurisdiction of the States with respect to the waters . . . of such States," *id.* at § 1370, and does not supersede, abrogate, or impair "the authority of each State to allocate quantities of water within its jurisdiction," or "supersede or abrogate rights to quantities of water which have been established by any State," *id.* at § 1251(g).

Thus, the CWA effectuates a partnership between the federal government and the states in controlling water pollution, and recognizes the states' primary responsibilities for achieving that goal and for regulating land and water use. Regardless of the extent to which MS4s are subject to regulation under the CWA, MS4s are subject to significant regulation under state and local laws. Indeed, the District's MS4 is located in California, and California provides for extensive regulation of water quality both as part of its NPDES program and under its other laws.[6]

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[6] California is authorized to administer its own NPDES program, and was the first state to be granted such authority. CAL. WAT. CODE § 13370. Apart from California's NPDES authority, the California Legislature extensively regulates water quality. In 1969, the Legislature enacted the Porter-Cologne Water Quality Act, which in many ways served as a model for the later-enacted CWA. *Id.* at §§ 13000 *et seq.* This Act establishes regional water quality control boards that are authorized to regulate water quality of water bodies within their respective regions, subject to the oversight authority of the State Water Resources Control Board. *Id.* at § 13200. The regional boards are authorized to adopt water quality control plans, or "basin

The principles of federalism that are a cornerstone of the CWA are well served in this case.

CONCLUSION

For the foregoing reasons, the Ninth Circuit decision should be reversed and remanded.

Respectfully submitted,

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August 2012

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plans," for each water basin within their respective jurisdictions. *Id.* at § 13240. In administering the basin plans, the regional boards may issue "waste discharge requirements" ("WDRs") for individual discharges into waterways, subject to effluent limitations and other conditions to protect water quality. *Id.* at § 13263.6. Thus, the regional boards may issue NPDES permits for individual discharges under the federal CWA, or instead may issue WDRs for such discharges under the Porter-Cologne Act.

JOINT APPENDIX

RECORD AND BRIEFS

No. 11-460

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In The

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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(Western Division – Los Angeles)
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Natural Resources Defense Council, Inc. et al v. County of Los Angeles et al

09/19/2008 55 FIRST AMENDED COMPLAINT against Defendants Dean D Efstathiou, County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Gloria Molina, Zev Yaroslavsky; Party defendant Donald L Wolfe terminated; amending Complaint – (Discovery) 1, filed by plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit 1). (jp) (Additional attachment(s) added on 10/7/2008: # 2 20 Days Summons Issued on First Amended Complaint) (jp). (Entered: 10/01/2008)

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09/08/2009 102 Amendment to MOTION for Partial Summary Judgment as to Liability 87

attaching Proposed Order filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Proposed Order) (Colangelo, Aaron) (Entered: 09/08/2009)

09/14/2009 113 NOTICE OF MOTION AND MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. Motion set for hearing on 10/5/2009 at 10:00 AM before Judge A. Howard Matz. (Attachments: # 1 Proposed Judgment) (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 114 MEMORANDUM in Support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District. Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 115 STATEMENT of Uncontroverted Facts and Conclusions of Law MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los

Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 116 DECLARATION of Professor Stanley Grant in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 117 DECLARATION of Professor Keith Stolzenbach in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 118 DECLARATION of Terrence Cooke in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control

District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 119 DECLARATION of Mark Pestrella in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 120 DECLARATION of Wayne Shumaker in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 121 DECLARATION of Robert Collacott in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne

B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit) (Gest, Howard) (Entered: 09/14/2009)

09/14/2009 122 DECLARATION of David Burhenn in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina. Zev Yaroslavsky. (Gest, Howard) (Entered: 09/14/2009)

09/15/2009 123 REQUEST FOR JUDICIAL NOTICE re MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/15/2009)

09/15/2009 124 REQUEST FOR JUDICIAL NOTICE re MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria

Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit) (Gest, Howard) (Entered: 09/15/2009)

09/15/2009 125 DECLARATION of Howard Gest in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit) (Gest, Howard) (Entered: 09/15/2009)

09/15/2009 126 REQUEST FOR JUDICIAL NOTICE re MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit) (Gest, Howard) (Entered: 09/15/2009)

09/29/2009 139 MEMORANDUM in Opposition to MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc.,

Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 09/29/2009)

09/29/2009 140 STATEMENT of Genuine Issues of Material Fact in Opposition to MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 09/29/2009)

09/29/2009 141 DECLARATION of Aaron Colangelo in opposition to MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit TT, # 2 Exhibit UU, # 3 Exhibit VV, # 4 Exhibit WW, # 5 Exhibit XX, # 6 Exhibit YY, # 7 Exhibit ZZ) (Colangelo, Aaron) (Entered: 09/29/2009)

09/29/2009 142 DECLARATION of Richard R. Homer in opposition to MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A) (Colangelo, Aaron) (Entered: 09/29/2009)

09/29/2009 145 OPPOSITION to MOTION. for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by

Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 146 DEFENDANTS' RESPONSE TO PLAINTIFFS' (1) SEPARATE STATEMENT OF UNDISPUTED FACTS AND (2) STATEMENT OF GENUINE ISSUES re MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles. Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 147 OBJECTION TO DECLARATION OF CARLOS CARREON re MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 148 REQUEST FOR JUDICIAL NOTICE re MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles,

Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit) (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 149 DECLARATION of David W. Burhenn opposition MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit) (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 150 DECLARATION of Robert Collacott in opposition to MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 151 DECLARATION of Howard Gest in opposition to MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich,

Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 09/29/2009)

09/29/2009 152 DECLARATION of Robert Collacott in opposition to MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit) (Gest, Howard) (Entered: 09/30/2009)

10/09/2009 164 REPLY in support of MOTION for Partial Summary Judgment as to Liability 87 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 10/09/2009)

10/09/2009 165 DECLARATION of Aaron Colangelo in support of MOTION for Partial Summary Judgment as to Liability 87 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit AAA, # 2 Exhibit BBB, # 3 Exhibit CCC, # 4 Exhibit DDD, # 5 Exhibit EEE, # 6 Exhibit FFF) (Colangelo, Aaron) (Entered: 10/09/2009)

10/09/2009 166 OPPOSITION TO OBJECTION TO DECLARATION OF CARLOS CARREON filed in support of re: MOTION for Partial Summary Judgment as to Liability 87 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 10/09/2009)

10/09/2009 167 REPLY in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 10/09/2009)

10/09/2009 168 REQUEST FOR JUDICIAL NOTICE re MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 10/09/2009)

10/09/2009 169 DECLARATION of Howard Gest in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by

		Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit, # 2 Exhibit) (Gest, Howard) (Entered: 10/09/2009)
10/09/2009	170	DECLARATION of Terrence Cooke in support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 10/09/2009)
10/13/2009	171	NOTICE OF MOTION AND MOTION for Leave to file Document One Day Out of Time (*Unopposed*) filed by plaintiff Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Plaintiffs' Reply to Defendants' Response to Plaintiffs' Statement of Undisputed Facts (Lodged), # 2 Proposed Order)(Colangelo, Aaron) (Entered: 10/13/2009)
10/13/2009	172	ORDER by Judge A. Howard Matz granting Unopposed Motion for Leave file Document One Day Out of Time 171. (jp) (Entered: 10/14/2009)

10/14/2009 173 NOTICE OF MOTION AND MOTION for Leave to file Surreply filed by plaintiff Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Surreply (Lodged), # 2 Second Declaration of Richard Homer in Support of Surreply (Lodged), # 3 Proposed Order)(Colangelo, Aaron) (Entered: 10/14/2009)

10/14/2009 174 MEMORANDUM in Opposition to MOTION for Leave to file Surreply 173 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 10/14/2009)

10/15/2009 175 MINUTES (IN CHAMBERS) by Judge A. Howard Matz: On the Court's own motion, the Court hereby takes OFF-CALENDAR and UNDER SUBMISSION (1) the Motion for Partial Summary Judgment as to Liability Filed by Plaintiffs Natural Resources Defense Council, Inc., et al. 87; (2) Defendants Motion for Summary Judgment as to First Amended Complaint 113; and (3) Plaintiffs Motion for Leave to File Surreply 173. The parties will be notified if

a hearing is necessary. (jp)
(Entered: 10/15/2009)

10/23/2009 187 EX PARTE APPLICATION for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Proposed Order)(Gest, Howard) (Entered: 10/23/2009)

10/23/2009 188 DECLARATION of Howard Gest in support of EX PARTE APPLICATION for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment 187 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 10/23/2009)

10/26/2009 189 MEMORANDUM in Opposition to EX PARTE APPLICATION for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion

for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment 187 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 10/26/2009)

10/26/2009 190 DECLARATION of Aaron Colangelo in opposition to EX PARTE APPLICATION for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment 187 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit GGG, # 2 Exhibit HHH, # 3 Exhibit III, # 4 Exhibit JJJ, # 5 Exhibit KKK, # 6 Exhibit LLL)(Colangelo, Aaron) (Entered: 10/26/2009)

11/02/2009 191 REPLY in support of EX PARTE APPLICATION for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment 187 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina,

Zev Yaroslavsky. (Gest, Howard) (Entered: 11/02/2009)

11/04/2009 195 NOTICE OF MOTION AND MOTION for Leave to file Supplemental Evidence in Support of Plaintiffs' Motion for Partial Summary Judgment filed by Plaintiffs' Natural Resources Defense Council, Inc., Santa Monica Baykeeper. Motion set for hearing on 11/30/2009 at 10:00 AM before Judge A. Howard Matz. (Attachments: # 1 Declaration of Tatiana K. Gaur in Support of Plaintiffs' Motion for Leave to File Supplemental Evidence, # 2 Exhibit Ex. MMM to Gaur Declaration, # 3 Exhibit Ex. NNN to Gaur Declaration, # 4 Proposed Order)(Kyle, Selena) (Entered: 11/04/2009)

11/04/2009 196 EX PARTE APPLICATION for Order for Vacating Hearing on Plaintiffs' Motion for Leave to File Supplemental Evidence filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Declaration of Selena Kyle in Support of Plaintiffs' Ex Parte Application for Order Vacating Hearing, # 2 Proposed Order)(Kyle, Selena) (Entered: 11/04/2009)

11/06/2009 197 ORDER by Judge A. Howard Matz that Plaitniffs' [sic] November 4, 2009 Ex Parte Application for Order

Vacating 196 Hearing on Plaintiffs Motion for Leave to File Supplemental Evidence in Support of Motion for Summary Judgment 196 195. The November 30, 2009 hearing on Plaintiffs' Motion for Leave is hereby vacated. Defendants may have until November 12, 2009 to respond to Plaintiffs' Motion for Leave to File Supplemental Evidence. (jp) (Entered: 11/06/2009)

11/12/2009 201 OPPOSITION in opposition to re: MOTION for Leave to file Supplemental Evidence in Support of Plaintiffs' Motion for Partial Summary Judgment 195 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 11/12/2009)

11/12/2009 202 DECLARATION of David W. Burhenn in opposition to MOTION for Leave to file Supplemental Evidence in Support of Plaintiffs' Motion for Partial Summary Judgment 195 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou,

Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 11/12/2009)

11/17/2009 203 REPLY in support MOTION for Leave to file Supplemental Evidence in Support of Plaintiffs' Motion for Partial Summary Judgment 195 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Kyle, Selena) (Entered: 11/17/2009)

12/02/2009 205 MINUTES (IN CHAMBERS) by Judge A. Howard Matz: The Court DENIES Plaintiffs Motion for Leave to File Supplemental Evidence in Support of Motion for Partial Summary Judgment 195 and Defendants' Ex Parte Application for Leave to File Supplemental Evidence in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment 187. To permit the parties to supplement their contentions and evidence at this belated stage would be unfair in different ways to both sides and to the Court. (jp) (Entered: 12/03/2009)

02/03/2010 257 DECLARATION of Aaron Colangelo in opposition to MOTION IN LIMINE (5) to Exclude Evidence Relating to Monitoring Data Collected at Mass Emission Stations in Four Watersheds and Monitoring at Surfrider Beach MOTION IN LIMINE (5) to

Exclude Evidence Relating to Monitoring Data Collected at Mass Emission Stations in Four Watersheds and Monitoring at Surfrider Beach 237 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A)(Colangelo, Aaron) (Entered: 02/03/2010)

02/05/2010 269 DEFENDANTS' REQUEST TO BRING TO THE COURT'S ATTENTION EVIDENCE OF A JOINT PROSECUTION AGREEMENT BETWEEN PLAINTIFFS AND THE LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD re MOTION for Partial Summary Judgment as to Liability 87 filed by Defendants County of Los Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 02/05/2010)

02/05/2010 270 DECLARATION of Howard Gest in opposition to MOTION for Partial Summary Judgment as to Liability 87 *in Support of Request to Bring to the Court's Attention Evidence of a Joint Prosecution Agreement Between Plaintiffs and the Los Angeles Regional Water Quality Control Board* filed by Defendants County of Los

Angeles, Los Angeles County Flood Control District, Michael Antonovich, Yvonne B Burke, Don Knabe, Dean D Efstathiou, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 02/05/2010)

02/08/2010 271 MINUTES: Proceedings: (1) Motion for Partial summary Judgment as to Liability filed by Plaitniffs Natural Resources Defense Counsel, Inc., et al., 87; (2) Defendants Motion for Summary Judgment as to First Amended Complaint 113 before Judge A. Howard Matz: Court circulates tentative order and hears oral argument. For reasons stated on the record, the Court takes the motions under submission. Order to issue. The parties are ordered to split the costs of obtaining a transcript of this hearing. On the Court's own motion, the Court vacates all pretrial and trial dates, to be reset after the Court rules on the pending summary judgment motions. Court Reporter: Cindy Nirenberg. (jp) (Entered: 02/08/2010)

02/25/2010 275 REQUEST FOR JUDICIAL NOTICE re MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 *and Declaration of Gary Hildebrand* filed by Defendants Michael Antonovich, Yvonne B

Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 02/25/2010)

02/25/2010 276 REQUEST FOR COURT TO CONSIDER RESPONSE OF CITY OF MALIBU TO BRIEF OF AMICUS CURIAE FILED BY CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD re MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Exhibit)(Gest, Howard) (Entered: 02/25/2010)

03/02/2010 280 MINUTES (IN CHAMBERS) by Judge A. Howard Matz: On 9/8/2009, Plaintiffs moved for partial summary judgment as to liability as to claims two and three (as to the District); as to the Surfrider Beach violations in claim four; and as to all of claims five and six. On 9/14/2009, Defendants filed their motion for summary judgment as to all counts. Plaintiffs have also filed a Motion for Leave to

File Surreply in Opposition to Defendants' Motion for Summary Judgment 173, which the Court DENIES. The court held a hearing on the summary judgment motions on 2/8/2010. For the following reasons, the Court GRANTS in part and DENIES in part Plaintiffs Motion 87. The court also GRANTS in part and DENIES in part Defendants Motion 113. Specifically, the Court DENIES summary judgment for both parties as to the watershed claims (claims one, two, three, and the Malibu Creek portion of claim four). The Court GRANTS summary judgment for the Plaintiffs on claim five and on the Surfrider Beach portion of claim four. The Court GRANTS summary judgment for the Defendants on all portions of claim six except for the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach. The Court DENIES summary judgment for both parties as to the adequacy of the 2008 Compliance Reports' treatment of Surfrider Beach. (See attached Minute Order for further information). (jp) (Entered: 03/03/2010)

03/03/2010 277 MEMORANDUM of Points and Authorities in Opposition filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. Re: Request for

Judicial Notice, Request for Relief,,,, 275 (Colangelo, Aaron) (Entered: 03/03/2010)

03/03/2010 278 DECLARATION of Selena Kyle re Request for Judicial Notice, Request for Relief,,,, 275 *Declaration of Selena Kyle in Opposition to Defendants' Request for Judicial Notice* filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A to Kyle Declaration)(Colangelo, Aaron) (Entered: 03/03/2010)

03/03/2010 279 RESPONSE filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeperto [sic] Motion Related Document,, 276 *to Defendants' Request to Consider Response of City of Malibu to California Regional Water Quality Control Board's Amicus Curiae Brief* (Colangelo, Aaron) (Entered: 03/03/2010)

03/10/2010 284 MEMORANDUM in Support of MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 (*Supplemental*) filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina,

Zev Yaroslavsky. (Gest, Howard) (Entered: 03/10/2010)

03/10/2010 285 MEMORANDUM in Support of MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 *Plaintiffs' Supplemental Brief in Support of Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment* filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 03/10/2010)

03/10/2010 286 DECLARATION of Ubaldo Fernandez in Support of Supplemental Brief MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit F, # 6 Exhibit G, #7 Exhibit H, # 8 Exhibit I, # 9 Exhibit J, # 10 Exhibit K, # 11 Exhibit L, # 12 Exhibit M, # 13 Exhibit N, # 14 Exhibit O, # 15 Exhibit P, # 16 Exhibit E)(Colangelo, Aaron) (Entered: 03/10/2010)

03/10/2010 287 DECLARATION of James Alamillo in Support of Supplemental Memorandum MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Colangelo, Aaron) (Entered: 03/10/2010)

03/10/2010 288 DECLARATION of Heather Burdick In Support of Supplemental Memorandum MOTION for Partial Summary Judgment as to Liability 87, MOTION for Summary Judgment as to Plaintiffs' First Amended Complaint 113 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H) (Beckman, David) (Entered: 03/10/2010)

03/11/2010 289 NOTICE OF ERRATA filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. correcting Memorandum in Support of Motion, 285 (Kyle, Selena) (Entered: 03/11/2010)

03/11/2010 290 NOTICE OF ERRATA filed by Plaintiffs Natural Resources

Defense Council, Inc., Santa Monica Baykeeper. correcting Declaration (Motion related), Declaration (Motion related), Declaration (Motion related) 286 (Attachments: # 1 Correct Exhibit E to Declaration of Ubaldo Fernandez in Support of Plaintiffs' Supplemental Brief on Summary Judgment (Dkt. No. 286))(Kyle, Selena) (Entered: 03/11/2010)

03/12/2010 291 NOTICE OF MOTION AND MOTION to Strike Declarations of (1) Ubaldo Fernandez and All Exhibits Thereto, (2) James Alamillo and All Exhibits Thereto, and (3) Heather Burdick and All Exhibits Thereto Declaration (Motion related), Declaration (Motion related), Declaration (Motion related) 286, Declaration (Motion related), Declaration (Motion related) 288, Declaration (Motion related), Declaration (Motion related) 287 filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1 Proposed Order)(Gest, Howard) (Entered: 03/12/2010)

03/12/2010 292 DECLARATION of David W. Burhenn in support of *Motion to Strike Declarations of Ubaldo Fernandez, James*

Alamillo and Heather Burdick filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 03/12/2010)

03/15/2010 293 MEMORANDUM in Opposition *to Motion to Strike* filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 03/15/2010)

03/15/2010 294 DECLARATION of Aaron Colangelo in opposition to *motion to strike* filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3) (Colangelo, Aaron) (Entered: 03/15/2010)

04/26/2010 295 MINUTES IN CHAMBERS by Judge A. Howard Matz: On 3/2/2010, the Court issued a ruling on the parties' cross motions for summary judgment, disposing of most of the claims. The Court reserved ruling on the "Watershed Claims." The Court found that the Plaintiffs had presented no evidence that discharges (meaning outflow from a point source) from the County or District portions of the MS4 were causing or contributing to pollutant exceedances at the mass

emissions stations downstream. The Court ordered the parties to file simultaneous supplementary briefing on these claims. (See attached Minute Order for further details). Plaintiffs have failed to establish a basis for the Court to find that standards-exceeding pollutants passed through County or District outflows upstream of the mass emissions stations at or near the time that exceedances were observed downstream, the Court GRANTS summary judgment to the Defendants on the watershed claims 113. (jp) (Entered: 04/27/2010)

05/10/2010 300 NOTICE OF MOTION AND MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. Motion set for hearing on 6/7/2010 at 10:00 AM before Judge A. Howard Matz. (Attachments: # 1 Proposed Order)(Kyle, Selena) (Entered: 05/10/2010)

05/10/2010 301 MEMORANDUM in Support of MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the*

Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Kyle, Selena) (Entered: 05/10/2010)

05/17/2010 302 Opposition in opposition to re: MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 05/17/2010)

05/17/2010 303 REQUEST FOR JUDICIAL NOTICE re MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the*

Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles; Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Gest, Howard) (Entered: 05/17/2010)

05/24/2010 304 REPLY in support of MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 05/24/2010)

06/07/2010 305 MINUTES: Proceedings: PLAINTIFFS Motion for Entry of Judgment

300 before Judge A. Howard Matz: Court issues tentative ruling and hears oral argument. For reasons and findings stated on the record, the Court grants the motion for entry of judgment. Plaintiffs are to lodge another proposed judgment that should also include language to stay this action pending appeal, as well as the fact that the parties reserve the right to move to reopen the case depending on later developments. Court Reporter: Cindy Nirenberg. (jp) (Entered: 06/07/2010)

06/08/2010 306 PROPOSED ORDER GRANTING PLAINTIFFS' MOTION FOR ENTRY OF FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(B) re MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. 1292(b)* MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. (Colangelo, Aaron) (Entered: 06/08/2010)

06/09/2010 307 ORDER by Judge A. Howard Matz GRANTING Plaintiffs' MOTION for Entry of Final Judgment Regarding the Watershed Claims Pursuant to FRCP 54(b) 300. (See attached Order for further information). The Clerk is directed to enter final judgment regarding the watershed claims: claims one, two, three, and the Malibu Creek portion of claim four in plaintiffs' First Amended Complaint. It is SO ORDERED (Made JS-6. Case Terminated.) (jp) (Entered: 06/09/2010)

06/09/2010 308 Objection re: MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* MOTION for Entry of Judgment pursuant to Rule 54(b) *or, in the Alternative, for Modification of the Court's Summary Judgment Orders to Allow Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b)* 300 *[Objection to Order (Dkt. No. 307)* filed by Defendants Michael Antonovich, Yvonne B Burke, County of Los Angeles, Dean D Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina, Zev Yaroslavsky. (Attachments: # 1

Proposed Order)(Gest, Howard) (Entered: 06/09/2010)

06/10/2010 309 RESPONSE filed by Plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeperto [sic] Objection/Opposition (Motion related), Objection/Opposition (Motion related), Objection/Opposition (Motion related) 308 (Colangelo, Aaron) (Entered: 06/10/2010)

06/10/2010 310 PROPOSED AMENDED ORDER DENIED by Judge A. Howard Matz, re Order, Terminated Case 307. (se) (Entered: 06/10/2010)

06/24/2010 315 NOTICE OF APPEAL to the 9th CCA filed by plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. Appeal of Order, Terminated Case 307. (Filing fee $455, receipt number 0973-7143319.) (Attachments: # 1 Judgment Appealed From)(Colangelo, Aaron) (Entered: 06/24/2010)

06/24/2010 318 First AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by plaintiffs Natural Resources Defense Council, Inc., Santa Monica Baykeeper. Amending Notice of Appeal to 9th Circuit Court of Appeals, 315 Filed On: June 9, 2010; Entered On: June 9, 2010; (Attachments: # 1 Judgment Appealed

From, # 2 Representation Statement, # 3 Civil Appeals Docketing Statement)(Colangelo, Aaron) (Entered: 06/24/2010)

06/25/2010 319 NOTIFICATION by Circuit Court of Appellate Docket Number 10-56017, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals 315. (dmap) (Entered: 06/25/2010)

United States Court of Appeals for the Ninth Circuit Court of Appeals Docket #10-56017 NRDC, et al v. County of Los Angeles, et al

07/02/2010	7	Filed (ECF) Appellants NRDC and Santa Monica Baykeeper Motion to expedite case. Date of service: 07/02/2010. [7392490] (AC)
07/12/2010	10	Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky response opposing motion (,motion to expedite case). Date of service: 07/12/2010. [7402053] (HDG)
07/19/2010	11	Filed (ECF) Appellants NRDC and Santa Monica Baykeeper reply to response (,motion to expedite case). Date of service: 07/19/2010. [7409896] (AC)
07/20/2010	12	Filed clerk order (Deputy Clerk:LKK): Appellants' opposed motion to expedite is granted. The briefing schedule is reset as follows: the opening brief is due August 6, 2010; the answering brief is due September 10, 2010 and the optional reply brief is due September 24, 2010. Upon completion of briefing, this case shall be calendared as soon possible. The parties shall refrain from seeking an extension of time to file a brief pursuant to Ninth Circuit Rule 31-2.2(a). Any request for an

		extension of time pursuant Ninth Circuit Rule 31-2.2(b) shall demonstrate extraordinary and compelling circumstances. [7411234] (AF)
08/06/2010	13	Submitted (ECF) Opening brief for review. Submitted by Appellants NRDC and Santa Monica Baykeeper. Date of service: 08/06/2010. [7431791] (AC)
08/09/2010	15	Filed Appellants NRDC and Santa Monica Baykeeper excerpts of record in 3 volumes. Served on 08/06/2010. [7434810] (GLS)
08/10/2010	14	Filed clerk order: The opening brief [13] submitted by NRDC and Santa Monica Baykeeper is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a blue cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7433983] (GLS)
08/16/2010	16	Received 7 paper copies of Opening brief [13] filed by NRDC and Santa Monica Baykeeper. [7441297] (SD)
09/10/2010	18	Submitted (ECF) Answering brief for review. Submitted by Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky.

		Date of service: 09/10/2010. [7470613] (DWB)
09/13/2010	19	Filed Appellees Michael Antonovich, Yvonne Burke and County of Los Angeles excerpts of record in 1 volume. Served on 09/10/2010. [7472439] (WP)
09/14/2010	20	Filed clerk order: The answering brief [18] submitted by Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7473511] (WP)
09/17/2010	21	Received 7 paper copies of Answering brief [18] filed by Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky. [7478459] (SD)
09/24/2010	22	Submitted (ECF) Reply brief for review. Submitted by Appellants NRDC and Santa Monica Baykeeper. Date of service: 09/24/2010. [7487154] (AC)

09/27/2010	25	Filed Appellant NRDC excerpts of record in 1 volume. Served on 09/24/2010. [7500474] (WP)
09/29/2010	23	Filed clerk order: The reply brief [22] submitted by NRDC is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a gray cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7490591] (WP)
10/01/2010	24	Received 7 paper copies of Reply brief [22] filed by NRDC. [7495215] (SD)
11/22/2010	28	Filed (ECF) Appellants NRDC and Santa Monica Baykeeper citation of supplemental authorities. Date of service: 11/22/2010. [7554537] (AC)
11/24/2010	29	Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky citation of supplemental authorities. Date of service: 11/24/2010. [7558409] (HDG)
12/10/2010	30	ARGUED AND SUBMITTED TO HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND. [7576297] (LN)
03/10/2011	31	FILED OPINION (HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND)

		AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Each party shall bear its own costs on appeal. Judge: MDS Authoring, FILED AND ENTERED JUDGMENT. [7675091] (RP)
03/16/2011	32	Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky Motion to extend time to file petition for rehearing until 03/31/2011. Date of service: 03/16/2011. [7684255] (HDG)
03/17/2011	33	Filed clerk order (Deputy Clerk:RR): Appellees' request for extension of time in which to file petition for rehearing and/or rehearing en banc is GRANTED. The petition is now due on or before April 1, 2011. [7684814] (RR)
03/31/2011	34	Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky petition for panel rehearing and petition for rehearing en banc (from 03/10/2011 opinion). Date of service: 03/31/2011. [7701359] – [COURT UPDATE: Removed PDF of Motion for Judicial

Notice, see [35] below. Resent NDA. 04/01/2011 by DB] (HDG)

04/01/2011 35 Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky Motion to take judicial notice of. Date of service: 04/01/2011. [7702393] – [COURT UPDATE: Attached searchable version of motion . Resent NDA. 04/01/2011 by DB] (HDG)

04/08/2011 36 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by California Stormwater Quality Association. Date of service: 04/08/2011. [7711141] (TAD)

04/11/2011 37 Entered appearance of Amicus Curiae – Pending CASQA. [7712256] (RR)

04/11/2011 38 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by CALIFORNIA STATE ASSOCIATION OF COUNTIES. Date of service: 04/11/2011. [7713114] – [COURT UPDATE: Edited docket text to reflect party filer. Removed request to take judicial notice. Refiled separately as: [40]. Resent NDA. 04/13/2011 by TT] (GTB)

04/13/2011	39	Entered appearance of Amicus Curiae CSAC. [7715194] (HH)
04/13/2011	40	Filed (ECF) Amicus Curiae – Pending CSAC Motion to take judicial notice of Public Records in Support of CSAC's Amicus Curiae Brief. Date of service: 04/11/2011. [7715288] – [COURT UPDATE: Replaced searchable version of motion. Replaced exhibits. Resent NDA. 04/13/2011 by TT] (GTB)
04/15/2011	41	Filed order (HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND) The application of the California Stormwater Quality Association for leave to file an amicus curiae brief (Docket No. 36) is GRANTED and the brief is deemed filed. The application of the California State Association of Counties for leave to file an amicus curiae brief (Docket No. 38) is GRANTED and the brief is deemed filed. [7718465] (KKW)
04/15/2011	42	Filed clerk order RR: The amicus brief [36] submitted by CASQA on 04/08/11 is filed. No paper copies of this brief are required. [7719304] (RR)
04/15/2011	43	Filed clerk order: The amicus brief [38] submitted by CSAC on 04/11/11 is filed. No paper copies of this brief are required. [7719392] (RR)
04/22/2011	44	Filed order (MILAN D. SMITH, JR.) Plaintiffs-Appellants are directed to

file a response to the Petition for Rehearing and Rehearing En Banc, filed with this court on March 31, 2011. The response shall not exceed 15 pages, unless it complies with the alternative length limitations of 4200 words or 390 lines of text, Circuit Rule 40-1(a), and shall be filed within 21 days of the date of this order. Parties who are registered for ECF must file the responses electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. SO ORDERED. . [7726279] (KKW)

05/13/2011 45 Filed (ECF) Appellants NRDC and Santa Monica Baykeeper response to Combo PFR Panel and En Banc (ECF Filing), for panel and en banc rehearing (statistical entry),Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing. Date of service: 05/13/2011. [7752560]. (SKK)

05/13/2011 46 COURT DELETED ENTRY. (Motion to Take Judicial Notice) Correct entry below: [47]. Original text: Filed (ECF) Appellants NRDC and Santa Monica Baykeeper response to Combo PFR Panel and En Banc (ECF Filing), for panel and en banc rehearing (statistical entry),Combo PFR Panel and En Banc (ECF

Filing) for panel and en banc rehearing, Response to PFPR and/or PFREB (ECF Filing). Date of service: 05/13/2011. [7752565]. -- [Edited 05/16/2011 by DB] (SKK)

05/16/2011 47 Filed (ECF) Appellants NRDC and Santa Monica Baykeeper Motion to take judicial notice of. Date of service: 05/16/2011. [7753526] (SKK)

05/23/2011 48 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION. Date of service: 05/23/2011. [7761559] (JRP)

05/23/2011 49 Entered appearance of Amicus Curiae California Regional Water Quality Control Board. [7761664] (RR)

05/23/2011 50 Filed clerk order RR: The amicus brief submitted by California Regional Water Quality Control Board on May 23,2011 is filed. No paper copies of this brief are required. [7761689] (RR)

05/26/2011 51 (COURT UPDATE: Stricken per 6/21/2011 Order; resent NDA) Original Text: Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky Motion

		for miscellaneous relief [Motion for Leave to File Reply Brief in Support of Petition for Rehearing and/or Rehearing En Banc]. Date of service: 05/26/2011. [7766459] – [Edited 06/21/2011 by HH] (HDG)
05/26/2011	52	(COURT UPDATE: Stricken per 6/21/2011 Order; resent NDA) Original Text: Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky reply to. Date of service: 05/26/2011. [7766460]. – [Edited 06/21/2011 by HH] (HDG)
06/17/2011	53	(COURT UPDATE: Stricken per 6/21/2001 Order; resent NDA) Original Text: Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky reply to. Date of service: 06/17/2011. [7790359]. – [Edited 06/21/2011 by HH] (HDG)
06/17/2011	54	(COURT UPDATE: Stricken per 6/21/2011 Order; resent NDA) Original Text: Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky Motion for miscellaneous

relief [Motion for Permission to File Reply to Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region]. Date of service: 06/17/2011. [7790360] – [Edited 06/21/2011 by HH] (HDG)

06/21/2011 55 Filed order (HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND) Appellees' motions to file a Reply Brief in support of rehearing or rehearing en banc (Docket Nos. 51 & 52) and to file a Reply Brief to the amicus curiae brief (Docket Nos. 53 & 54) are DENIED. The Clerk of the Court is directed to strike these documents from the docket. [7792385] (KKW)

07/12/2011 56 Filed order (HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND) Appellees' motion to take judicial notice of certain documents (Docket No. 35), Amicus Curiae California State Association of Counties' request for judicial notice (Docket No. 40), and Appellants' motion for judicial notice (Docket No. 47) are DENIED. [7817604] (KKW)

07/13/2011 57 FILED ORDER AND OPINION (HARRY PREGERSON, MILAN D. SMITH, JR. and H. RUSSEL HOLLAND) AFFIRMED IN PART, REVERSED IN PART AND REMANDED Each party shall bear

its own costs on appeal. This Court's Opinion, filed March 10, 2011, and published at 636 F.3d 1235 (9th Cir. 2011), is withdrawn and replaced by the attached Opinion. With this filing, the panel has voted unanimously to deny Appellees' petition for panel rehearing. Judge Pregerson and Judge M. Smith have voted to deny Appellees' petition for rehearing en banc, and Judge Holland so recommends. The full court has been advised of the Opinion and petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, Appellees' petition for rehearing or for rehearing en banc is DENIED. No further petitions for rehearing or rehearing en banc will be entertained in this case. Judge: MDS Authoring, FILED AND ENTERED JUDGMENT. [7817898] (RP)

07/18/2011 58 Filed (ECF) Appellees Michael Antonovich, Yvonne Burke, County of Los Angeles, Dean D. Efstathiou, Don Knabe, Los Angeles County Flood Control District, Gloria Molina and Zev Yaroslavsky Motion to stay the mandate. Date of service: 07/18/2011. [7824317] (HDG)

07/20/2011 59 Filed order (MILAN D. SMITH, JR.) Appellees' motion to stay the issuance of the mandate for ninety (90) days (Docket No. 58) is GRANTED. [7827325] (KKW)

STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LOS ANGELES REGION

ORDER NO. 01-182 NPDES PERMIT NO. CAS004001 WASTE DISCHARGE REQUIREMENTS FOR MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH

December 13, 2001
(Amended on September 14, 2006 by Order R4-2006-0074 and on August 9, 2007 by Order R4-2007-0042)

(Filed Sep. 8, 2009)

December 13, 2001 (As amended on September 14, 2006 by Order R4-2006-0074 and on August 9, 2007 by Order R4-2007-0042)

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STATE OF CALIFORNIA

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LOS ANGELES REGION

ORDER NO. 01-182
NPDES PERMIT NO. CAS004001
WASTE DISCHARGE REQUIREMENTS
FOR
MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES THEREIN, EXCEPT THE CITY OF LONG BEACH

The California Regional Water Quality Control Board, Los Angeles Region (hereinafter referred to as the Regional Board) finds:

A. Existing Permit

The Los Angeles County Flood Control District, the County of Los Angeles, and 84 incorporated cities within the Los Angeles County Flood Control District (see Attachment A, List of Permittees), hereinafter referred to separately as Permittees and jointly as the Discharger, discharge or contribute to discharges of storm water and urban runoff from municipal separate storm sewer systems

(MS4s), also called storm drain systems. The discharges flow to water courses within the Los Angeles County Flood Control District and into receiving waters of the Los Angeles Region. These discharges are covered under countywide waste discharge requirements contained in Order No. 96-054 adopted by this Regional Board on July 15, 1996, which replaced Order No. 90-079 adopted by this Regional Board on June 18, 1990. Order No. 96-054 also serves as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.

B. Nature of Discharges and Sources of Pollutant

1. Storm water discharges consist of surface runoff generated from various land uses in all the hydrologic drainage basins that discharge into water bodies of the State. The quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events. The primary constituents of concern currently identified by the Los Angeles County Flood Control District Integrated Receiving Water Impacts Report (1994-2000) are cyanide, indicator bacteria, total dissolved solids, turbidity, total suspended solids, nutrients, total aluminum, dissolved cadmium, copper, lead, total mercury, nickel, zinc, bis(2-ethylhexyl)phthalate, polycyclic aromatic hydrocarbons (PAHs), diazinon, and chlorpyrifos.

2. Certain pollutants present in storm water and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over. Examples of such pollutants and their respective sources are: PAHs which are products of internal combustion engine operation, nitrates, bis (2-ethylhexyl) phthalate and mercury from atmospheric deposition, lead from fuels, copper from brake pad wear, zinc from tire wear, dioxins as products of combustion, and natural-occurring minerals from local geology. However, the implementation of the measures set forth in this Order is intended to reduce the entry of these pollutants into storm water and their discharge to receiving waters.

3. Water quality assessments conducted by the Regional Board identified impairment, or threatened impairment, of beneficial uses of water bodies in the Los Angeles Region. The causes of impairments include pollutants of concern identified in municipal storm water discharges by the County of Los Angeles in the Integrated Receiving Water Impacts Report (1994-2000). Pollutants in storm water can have damaging effects on both human health and aquatic ecosystems.

4. The Los Angeles County Grand Jury, September 2000, completed an investigation into the health risks of swimming near beaches in Los Angeles County and made several recommendations to reduce public health risks (Final Report, Grand Jury, Los Angeles County, 1999-2000). The Grand Jury recommended

that the Regional Board consider among other actions, (i) a focus on setting contaminant limits rather than programmatic evaluations, (ii) audit of MS4 Permittee programs; and (iii) clarifying enforcement responsibilities between the State and local governments.

5. Studies and research conducted by other Regional agencies, academic institutions, and universities have also identified storm water and urban runoff as significant sources of pollutants to surface waters in Southern California. See, e.g., [*Surface Runoff to the Southern California Bight*, Southern California Coastal Water Research Project, (1992); *Impacts of Urban Runoff on Santa Monica Bay and Surrounding Ocean Waters* (Gersberg, R.M., 1995); *State of the Bay 1998*, Santa Monica Bay Restoration Project; *Storm Water Impact*, In, Southern California Environmental Report Card 1999, Institute of the Environment, University of California, Los Angeles (Stenstrom, M.S., 1999); *Distribution of Anthropogenic and Natural Debris on the Mainland Shelf of Southern California Bight*, Shelly L. Moore and M. James Allen (1999); *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, Haile, R.W. et al. (1999); *Huntington Beach Closure Investigation: Technical Review* (University of Southern California, 2000); *A Regional Survey of the Microbiological Water Quality Along the Shoreline of the Southern California Bight*, Rachel T. Noble *et al.* (2001); *Integrated Receiving Water Impacts*

Report (1994-2000), County of Los Angeles (2001)].

6. Development and urbanization increase pollutant load, volume, and discharge velocity. First, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops and parking lots. Natural vegetated soil can both absorb rainwater and remove pollutants providing an effective natural purification process. In contrast, pavement and concrete can neither absorb water nor remove pollutants, and thus the natural purification characteristics are lost. Second, urban development creates new pollution sources as the increased density of human population brings proportionately higher levels of vehicle emissions, vehicle maintenance wastes, municipal sewage waste, pesticides, household hazardous wastes, pet wastes, trash, and other anthropogenic pollutants. Development and urbanization especially threaten environmentally sensitive areas. Such areas have a much lower capacity to withstand pollutant shocks than might be acceptable in the general circumstance. In essence, development that is ordinarily insignificant in its impact on the environment may in a particular sensitive environment become significant. These environmentally sensitive areas designated by the State and/or the County of Los Angeles include Areas of Special Biological Significance (ASBS), water bodies designated as supporting a RARE beneficial use,

Significant Natural Areas (SNAs), and Significant Ecological Areas (SEAs).

7. The increased volume, increased velocity, and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion and impair stream habitat in natural drainages. Studies have demonstrated a direct correlation between the degree of imperviousness of an area and the degradation of its receiving waters. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as 10 percent conversion from natural to impervious surfaces. Percentage impervious cover is a reliable indicator and predictor of potential water quality degradation expected from new development. (*Impervious Cover as An Urban Stream Indicator and a Watershed Management Tool*, Schueler, T. and R. Claytor, In, Effects of Water Development and Management on Aquatic Ecosystems (1995), ASCE, New York; Leopold, L. B., (1973), *River Channel Change with Time: An Example*, Geological Society of America Bulletin, v. 84, p. 1845-1860; Hammer, T. R., (1972), *Stream Channel Enlargement Due to Urbanization: Water Resources Research*, v. 8, p. 1530-1540; Booth, D. B., (1991), *Urbanization and the Natural Drainage System – Impacts, Solutions and Prognoses*: The Northwest Environmental Journal, v. 7, p. 93-118; Klein, R. D., (1979), *Urbanization and Stream Quality Impairment*: Water Resources Bulletin, v. 15, p. 948-963; May, C.

W., Horner, R. R., Karr, J. R., Mar, B. W., and Welch, E. B., (1997), *Effects of Urbanization on Small Streams in the Puget Sound Lowland Ecoregion*: Watershed Protection Techniques, v. 2, p. 483-494; Morisawa, M. and LaFlure, E. *Hydraulic Geometry, Stream Equilibrium and Urbanization* In Rhodes, D. P. and Williams, G. P. *Adjustments to the Fluvial System* p.333-350. (1979); Dubuque, Iowa, Kendall/Hunt. Tenth Annual Geomorphology Symposia Series; and *The Importance of Imperviousness*: Watershed Protection Techniques, 1(3), Schueler, T. (1994).)

8. The County of Los Angeles has identified as the seven highest priority industrial and commercial critical source types, (i) wholesale trade (scrap recycling, auto dismantling); (ii) automotive repair/parking; (iii) fabricated metal products; (iv) motor freight; (v) chemical and allied products; (vi) automotive dealers/gas stations; (vii) primary metal products (*Critical Source Selection and Monitoring Report*, Los Angeles County Department of Public Works – Sept. 1996). Monitoring conducted by Los Angeles County and the Regional Board demonstrates that the priority industrial sectors and auto repair facilities (one of the commercial sectors) on the list, contribute significant concentrations of heavy metals to storm water (*Los Angeles County 1999-2000 Storm Water Monitoring Report*, Los Angeles County Department of Public Works – July 2000; *Compliance Assessment of the Auto Dismantling Industry; Evaluation of the California General Industrial Storm Water*

Permit, H. Chang, (2001), 70 pp., California Regional Water Quality Control Board, Los Angeles Region).

9. The discharge of washwaters and contaminated storm water from industries and businesses specified in this Order for inspection by Permittees is an environmental threat and can also adversely impact public health and safety. For example, a review of industrial waste/pretreatment records performed in 1995 in the County of Los Angeles on illicit discharges indicates that automotive service facilities and food service facilities sometimes discharge polluted washwaters to the MS4. The pollutants of concern in such washwaters include food waste, oil and grease, and toxic chemicals. Other storm water/industrial waste programs in California have reported similar observations. Illicit discharges from automotive service facilities and food service facilities have been identified elsewhere as a major cause of widespread contamination and water quality problems (Washtenaw County Statutory Drainage Board – 1987 Huron River Pollution Abatement Program).

10. Studies indicate that facilities with paved surfaces subject to frequent motor vehicular traffic (such as parking lots and fast food restaurants), or facilities that perform vehicle repair, maintenance, or fueling (automotive service facilities) are potential sources of pollutants of concern in storm water. [References: Pitt *et al.*, *Urban Storm Water Toxic*

Pollutants: Assessment, Sources, and Treatability, Water Environment Res., 67, 260 (1995); *Results of Retail Gas Outlet and Commercial Parking Lot Storm Water Runoff Study*, Western States Petroleum Association and American Petroleum Institute, (1994); *Action Plan Demonstration Project, Demonstration of Gasoline Fueling Station Best Management Practices*, Final Report, County of Sacramento (1993); *Source Characterization*, R. Pitt, In Innovative Urban Wet-Weather Flow Management Systems (2000) Technomic Press, Field, R *et al.* editors; *Characteristics of Parking Lot Runoff Produced by Simulated Rainfall*, , [sic] L.L. Tiefenthaler *et al.* Technical Report 343, Southern California Coastal Water Research Project (2001).]

11. Retail Gasoline Outlets (RGOs) are points of convergence for vehicular traffic and are similar to parking lots and urban roads. Studies indicate that storm water discharges from RGOs have high concentrations of hydrocarbons and heavy metals. [*The Quality of Trapped Sediments and Poor Water within Oil Grit Separators in Suburban MD*, Schueler T. and Shepp D. (1992), and *Concentrations of Selected Constituents in Runoff from Impervious Surfaces in Four Urban Catchments of Different Landuse*, Ranabal, F.I., and T.J. Gizzard (1995), In Proceedings of the Fourth Biennial Stormwater Research Conference, Florida, pp-42-52]. Pilot studies indicate that treatment control best management practices installed at retail gasoline stations are effective in removing pollutants, reasonable

in capital cost, easy to operate, and do not present safety risks [*Rouge River National Wet Weather Demonstration Project, Task Product Memorandum – Evaluation of On-line Media Filters RPO-NPS-TPM59.00*, Wayne County, MI, March 1999]. The Regional Board and the San Diego Regional Board have jointly prepared a Technical Report on the applicability of new development BMP design criteria for retail gasoline outlets, (*Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts*, (June 2001)). Retail Gasoline Outlets in Western U.S. States (such as Washington and Oregon) are already subject to numerical BMP design criteria, as well in other U.S. States.

C. Permit Background

1. The essential components of the Storm Water Management Program, as established by federal regulations [40 CFR 122.26(d)] are: (i) Adequate Legal Authority, (ii) Fiscal Resources, (iii) Storm Water Quality Management Program (SQMP) – (Public Information and Participation Program, Industrial/Commercial Facilities Program, Development Planning Program, Development Construction Program, Public Agency Activities Program, Illicit Connection and Illicit Discharges Elimination Program), and (iv) Monitoring and Reporting Program.

2. The Permittees have filed a Report of Waste Discharge (ROWD), dated February 1, 2001, and applied for renewal of their waste discharge requirements that serves as an NPDES permit to discharge wastes to surface waters. The ROWD includes a proposed SQMP and a Monitoring Program. The proposed SQMP contains programs previously approved under Board Order No. 96-054 in the following areas:

   Public Information and Participation
   Development Planning
   Development Construction
   Public Agency Activities
   Illicit Connection/Illicit Discharge
   Elimination Program

   These programs are revised pursuant to the provisions of this Order after adoption.

3. The County of Los Angeles has previously conducted source identification and pollutant characterization consistent with 40 CFR 122.26(d)(1)(ii) and (iii) under its storm water Monitoring Program. The Monitoring Program submitted with the ROWD proposes to advance the assessment of receiving water impacts, identification of sources of pollution, evaluation of Best Management Practices (BMPs), and measurement of long term trends in mass emissions.

4. The Regional Board has reviewed the ROWD and has determined it to be complete under the reapplication policy of MS4s issued by the U.S. Environmental Protection Agency

(USEPA) (61 *Fed. Reg.* 41697). The Regional Board finds that the Permittees' proposed SQMP, incorporating the additional and/or revised provisions contained in this Order would meet the minimum requirements of federal regulations.

5. The City of Los Angeles has conducted shoreline and nearshore water quality monitoring off the Santa Monica Bay since the 1950s under the monitoring program for the Hyperion Waste Water Treatment Plant (NPDES No. CA0109991). The monitoring results indicate that effluent from Hyperion's 5-Mile Outfall does not impinge the shoreline, and that elevated bacterial counts are associated with runoff from storm drains and discharges from piers. In 1994, the Regional Board approved the relocation of Hyperion's shoreline stations to implement a bay-wide, regional shoreline-monitoring program associated with storm drain outfalls in the Santa Monica Bay. The City of Los Angeles requested that the shoreline-monitoring requirement be incorporated in this Order. The shoreline pathogen monitoring requirements are outlined in the Monitoring Program for this Order.

D. Permit Coverage

1. The requirements in this Order cover all areas within the boundaries of the Permittee municipalities (see Attachment A) over which they have regulatory jurisdiction as well as unincorporated areas in Los Angeles County

within the jurisdiction of the Regional Board. The Permittees serve a population of about 9.5 million [Reference: *2000 Census of Population and Housing*, Bureau of the Census, U.S. Department of Commerce (2001)] in an area of approximately 3,100 square miles.

2. Federal, state, regional or local entities within the Permittees' boundaries or in jurisdictions outside the Los Angeles County Flood Control District, and not currently named in this Order, may operate storm drain facilities and/or discharge storm water to storm drains and watercourses covered by this Order. The Permittees may lack legal jurisdiction over these entities under state and federal constitutions. The Regional Board will coordinate with these entities to implement programs that are consistent with the requirements of this Order. The Regional Board will consider such facilities for coverage in 2003 under its NPDES permitting scheme pursuant to USEPA Phase II storm water regulations.

3. Sources of discharges into receiving waters in the County of Los Angeles but in jurisdictions outside its boundary include the following:

   About 34 square miles of unincorporated area in Ventura County, which drain into Malibu Creek and then to Santa Monica Bay,

   About 9 square miles of the City of Thousand Oaks, which also drain into Malibu

Creek and then to Santa Monica Bay, and

About 86 square miles of area in Orange County, which drain into Coyote Creek and then into the San Gabriel River.

The Regional Board will ensure that storm water management programs for the areas in Ventura County and the City of Thousand Oaks that drain into Santa Monica Bay are consistent with the requirements of this Order. The Regional Board will coordinate with the Santa Ana Regional Board so that storm water management programs for the areas in Orange County that drain into Coyote Creek are consistent with the requirements of this Order.

4. This permit is intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the Maximum Extent Practicable (MEP) from the permitted areas in the County of Los Angeles to the waters of the U.S. subject to the Permittees' jurisdiction.

5. Permittees have expressed their intention to work cooperatively to control the contribution of pollutants from one portion of the MS4 to another portion of the system. Permittees may control the contribution of pollutants to the MS4 from non-permittee dischargers such as Caltrans, the U.S. Department of Defense, and other state and

federal facilities, through interagency agreements.

E. Federal, State, and Regional Regulations

1. The Water Quality Act of 1987 added Section 402(p) to the federal Clean Water Act (CWA) (33 U.S.C. § 1251-1387). This section requires the USEPA to establish regulations setting forth NPDES requirements for storm water discharges in two phases.

   - The USEPA Phase I storm water regulations were directed at MS4s serving a population of 100,000 or more, including interconnected systems and storm water discharges associated with industrial activities, including construction activities. The Phase I Final Rule was published on November 16, 1990 (55 *Fed. Reg.* 47990).

   - The USEPA Phase II storm water regulations are directed at storm water discharges not covered in Phase I, including small MS4s (serving a population of less than 100,000), small construction projects (one to five acres), municipal facilities with delayed coverage under the Intermodal Surface Transportation Efficiency Act of 1991, and other discharges for which the USEPA Administrator or the State determines that the storm water discharge contributes to a violation of a water quality standard, or is a significant contributor of pollutants to waters of the United States. The Phase II Final

Rule was published on December 8, 1999 (64 *Fed. Reg.* 68722).

2. The USEPA published an 'Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits' on August 26, 1996 (61 *Fed. Reg.* 43761). This policy discusses the appropriate kinds of water quality-based effluent limitations to be included in NPDES storm water permits to provide for the attainment of water quality standards.

3. The USEPA published an 'Interpretative Policy Memorandum on Reapplication Requirements' for MS4 permits on August 9, 1996 (61 *Fed. Reg.* 41697). This policy requires that MS4 reapplication for reissuance for a subsequent five-year permit term contain certain basic information and information for proposed changes and improvements to the storm water management program and monitoring program.

4. The USEPA has entered into a Memorandum of Agreement (MOA) with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for enhancing coordination regarding the protection of endangered and threatened species under Section 7 of the Endangered Species Act and the CWA's Water Quality Standards and NPDES programs. Among other actions, the MOA establishes a framework for coordination of actions by the USEPA, the Services, and CWA delegated States on CWA permit issuance under

Section 402 of the CWA [66 *Fed. Reg.* 11202-11217].

5. USEPA regulations at 40 CFR 122.26(d)(2)(iv)(A) and 40 CFR 122.26(d)(2)(iv)(C) require that MS4 permittees implement a program to monitor and control pollutants in discharges to the municipal system from industrial and commercial facilities that contribute a substantial pollutant load to the MS4. The regulations require that permittees establish priorities and procedures for inspection of industrial facilities and priority commercial establishments. This permit, consistent with the USEPA policy, incorporates a cooperative partnership, including the specifications of minimum expectations, between the Regional Board and the Permittees for the inspection of industrial facilities and priority commercial establishments to control pollutants in storm water discharges (58 *Fed. Reg.* 61157).

6. Section 402(p) of the CWA (33 U.S.C. § 1342(p) provides that MS4 permits must "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design engineering method and such other provisions as the [EPA] Administrator or the State determines appropriate for the control of such pollutants." The State Water Resources Control Board's (State Board) Office of Chief Counsel (OCC) has issued a memorandum interpreting the meaning of MEP to include technical feasibility, cost, and benefit derived with the

burden being on the municipality to demonstrate compliance with MEP by showing that a BMP is not technically feasible in the locality or that BMPs costs would exceed any benefit to be derived (dated February 11, 1993).

7. The CWA authorizes the USEPA to permit a state to serve as the NPDES permitting authority in lieu of the USEPA. The State of California has in-lieu authority for an NPDES program. The Porter-Cologne Water Quality Control Act authorizes the State Board, through the Regional Boards, to regulate and control the discharge of pollutants into waters of the State. The State Board entered into a MOA with the USEPA, on September 22, 1989, to administer the NPDES Program governing discharges to waters of the U.S.

8. Section 303(d) of the CWA requires that the State identify a list of impaired water-bodies and develop and implement Total Maximum Daily Loads (TMDLs) for these waterbodies (33 U.S.C. §1313(d)(1)). A TMDL specifies the maximum amount of a pollutant that a water-body can receive, still meet applicable water quality standards and protect beneficial uses. The USEPA entered into a consent decree with the Natural Resources Defense Council (NRDC), Heal the Bay, and the Santa Monica BayKeeper on March 22, 1999, under which the Regional Board must adopt all TMDLs for the Los Angeles Region within 13 years from that date. This permit incorporates a

provision to implement and enforce approved load allocations for municipal storm water discharges and requires amending the SQMP after pollutants loads have been allocated and approved.

9. Section 6217(g) of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) requires coastal states with approved coastal zone management programs to address non-point pollution impacting or threatening coastal water quality. CZARA (16 U.S.C. § 1451-1465) amends the Coastal Zone Management Act of 1972, to address five sources of non-point pollution: agriculture, silviculture, urban, marinas, and hydromodification. This NPDES permit addresses the management measures required for the urban category, with the exception of septic systems. The Regional Board addresses septic systems through the administration of other programs.

10. On May 18, 2000, the USEPA established numeric criteria for priority toxic pollutants for the State of California (California Toxics Rule (CTR)) 65 *Fed. Reg.* 31682 (40 CFR 131.38), for the protection of human health and aquatic life. These apply as ambient water quality criteria for inland surface waters, enclosed bays, and estuaries. The State Board adopted the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) – 2000*, on March 2, 2000, for implementation of the CTR (State Board

Resolution No. 2000-15 as amended by Board Resolution No. 2000-030). This policy requires that discharges comply with TMDL-derived load allocations as soon as possible but no later than 20 years from the effective date of the policy.

11. The State Board adopted a revised Water Quality Control Plan for Ocean Waters of California (Ocean Plan) on July 23, 1997. The Ocean Plan contains water quality objectives which apply to all discharges to the coastal waters of California.

12. The State Board in *In Re*: California Department of Transportation (State Board Order WQ 2001-08), determined that the discharge of storm water to ASBS is subject to the prohibition in the Ocean Plan against the discharge of wastes to an ASBS.

13. The Regional Board adopted an updated Water Quality Control Plan (Basin Plan) for the Los Angeles Region on June 13, 1994, '*Water Quality Control Plan, Los Angeles Region: Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties*, (1994).' The Basin Plan designates beneficial uses of receiving waters and specifies both narrative and numerical water quality objectives for the receiving waters in Los Angeles County.

14. The Regional Board on September 19, 2001, adopted amendments to the Basin Plan, to incorporate TMDLs for trash in the Los Angeles River (Resolution No. 01-013) and Ballona Creek (Resolution No. 01-014). After

approval by the State Board, the Office of Administrative Law, and the USEPA, the TMDLs for trash will be effective and enforceable.

15. The Regional Board on April 13, 1998, approved BMPs for sidewalk rinsing to minimize the discharge of wash waters to the storm drain system (Resolution No. 98-08). By the same resolution, the Regional Board prohibited the discharge of municipal street wash waters to the storm drain system.

16. The Regional Board on April 13, 1998, approved recommended BMPs for industrial/commercial facilities (Resolution No. 98-08).

17. The Regional Board on April 22, 1999, approved a list of BMPs for use in development planning and development construction (Resolution No. 99-03)

18. The Regional Board adopted and approved requirements for new development and significant redevelopment projects in Los Angeles County to control the discharge of storm water pollutants in post-construction storm water, on January 26, 2000, in Board Resolution No. R-00-02. The Regional Board Executive Officer issued the approved Standard Urban Storm Water Mitigation Plans (SUSMPs) on March 8, 2000. The State Board in large part affirmed the Regional Board action and SUSMPs in State Board Order No. WQ 2000-11 issued on October 5, 2000.

- The State Board's Chief Counsel has issued a statewide policy memorandum (dated December 26, 2000), which interprets the Order to provide broad discretion to Regional Boards and identifies potential future areas for inclusion in SUSMPs and the types of evidence and findings necessary. Such areas include ministerial projects, projects in environmentally sensitive areas, and water quality design criteria for RGOs.
- The State Board's Chief Counsel interprets the Order to encourage regional solutions and endorses a mitigation fund or "bank" that may be funded by developers who obtain waivers from the numerical design standards for new development and significant redevelopment.

19. 40 CFR 131.10(a) prohibits states from designating waste transport or waste assimilation as a use for any water of the U.S. Authorizing the construction of a storm water/urban runoff treatment facility in a jurisdictional water body would be tantamount to accepting waste assimilation as an appropriate use for that water body. Furthermore, the construction and operation of a pollution control facility in a water body can impact the physical, chemical, and biological integrity as well as the beneficial uses of the water body. Therefore, storm water treatment and/or mitigation in accordance with SUSMPs and any other requirements of this

Order must occur prior to the discharge of storm water into a water of the U.S.

20. The Regional Board supports a Watershed Management Approach to address water quality protection in the region. The objective of the Watershed Management Approach should be to provide a comprehensive and integrated strategy towards water resource protection, enhancement, and restoration while balancing economic and environmental impacts within a hydrologically defined drainage basin or watershed. It emphasizes cooperative relationships between regulatory agencies, the regulated community, environmental groups, and other stakeholders in the watershed to achieve the greatest environmental improvements with available resources.

21. To promote a watershed management approach, the County of Los Angeles is divided into six Watershed Management Areas (WMAs) as follows:

    Malibu Creek and Rural Santa Monica Bay WMA
    Ballona Creek and Urban Santa Monica Bay WMA
    Los Angeles River WMA
    San Gabriel River WMA
    Dominguez Channel/Los Angeles Harbor WMA, and
    Santa Clara River WMA

    Attachment A shows the list of Permittees under each WMA and some Permittees have

expressed an intent to form sub-watershed groups within the WMA to promote regional solutions for the mitigation of storm water discharge pollution.

22. To facilitate compliance with federal regulations, the State Board has issued two statewide general NPDES permits for storm water discharges: one for storm water from industrial sites [NPDES No. CAS000001, General Industrial Activity Storm Water Permit (GIASP)] and the other for storm water from construction sites [NPDES No. CAS000002, General Construction Activity Storm Water Permit (GCASP)]. The GCASP was reissued on August 19, 1999. The GIASP was reissued on April 17, 1997. Facilities discharging storm water associated with industrial activities and construction projects with a disturbed area of five acres or more are required to obtain individual NPDES permits for storm water discharges, or to be covered by a statewide general permit by completing and filing a Notice of Intent (NOI) with the State Board. The USEPA guidance anticipates coordination of the state-administered programs for industrial and construction activities with the local agency program to reduce pollutants in storm water discharges to the MS4.

    The Regional Board is the enforcement authority in the Los Angeles Region for the two statewide general permits regulating discharges from industrial facilities and construction sites, and all NPDES storm water

and non-storm water permits issued by the Regional Board. These industrial and construction sites and discharges are also regulated under local laws and regulations.

23. The State Board, on October 28, 1968, adopted Resolution No. 68-16, which established an anti-degradation policy for the State and Regional Boards. This policy restricts the degradation of surface waters and protects waterbodies where existing water quality is higher than is necessary for the protection of beneficial uses.

24. The State Board, on June 17, 1999, adopted Order No. WQ 99-05, which, in a precedential decision, identifies acceptable receiving water limitations language to be included in municipal storm water permits issued by the State and Regional Boards. The receiving water limitations included herein are consistent with the State Board Order, USEPA Policy, and the U.S. Appellate court decision in, *Defenders of Wildlife v. Browner* (9th. Cir, 1999). The State Board OCC has determined that the federal court decision did not conflict with State Board Order No. WQ 99-05 (memorandum dated October 14, 1999)

25. California Water Code (CWC) § 13263(a) requires that waste discharge requirements issued by the Regional Board shall implement any relevant water quality control plans that have been adopted; shall take into consideration the beneficial uses to be protected and the water quality objectives reasonably

required for that purpose; other waste discharges; the need to prevent nuisance; and provisions of CWC § 13241. The Regional Board has considered the requirements of § 13263 and § 13241, and applicable plans, policies, rules, and regulations in developing these waste discharge requirements.

26. CWC § 13370 *et seq.* requires that waste discharge requirements issued by the Regional Boards be consistent with provisions of the federal CWA and its amendments.

27. On March 12, 2001, the U.S. Court of Appeals ruled that it is necessary to obtain a NPDES permit for application of aquatic pesticides to waterways. (*Headwaters, Inc. vs. Talent Irrigation District*, 243 F.3d. 526 (9th Cir., 2001)) This decision is controlling in California for nonagricultural applications of pesticides to waterways. The State Board adopted a general NPDES permit (Order No. 2001-12-DWQ) on July 19, 2001, for public entities that discharge pollutants to waters of the U.S. associated with the application of aquatic pesticides for resource or pest management. Public entities that conduct such activities must seek coverage under the general permit.

Findings Related To The Incorporation Of The Santa Monica Bay Beaches Dry Weather Bacteria TMDL And The Marina Del Rey Harbor Mothers' Beach And Back Basins Bacteria TMDL

28. The Regional Board adopted the Santa Monica Bay Beaches Dry Weather TMDL for Bacteria (hereinafter "Dry Weather Bacteria TMDL") on January 24, 2002. The TMDL was subsequently approved by the State Board, the Office of Administrative Law (OAL), and the USEPA and became effective on July 15, 2003.

29. The Regional Board adopted the Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL (hereinafter "MDR Bacteria TMDL") on August 7, 2003. The TMDL was subsequently approved by the SWRCB, the OAL, and the USEPA and became effective on March 18, 2004.

30. The Waste Load Allocations (WLAs) in the Dry Weather Bacteria TMDL and the MDR Bacteria TMDL are expressed as the number of allowable days that the Santa Monica Bay beaches, Mothers' Beach and Basins D, E, and F in Marina del Rey Harbor may exceed the Basin Plan water quality objectives for protection of Water Contact Recreation (REC-1) in marine waters, specifically the water quality objectives for bacteria. Appropriate modifications to this order are therefore included in Parts 1 (Discharge Prohibitions) and 2 (Receiving Water Limitations), pursuant to 40 CFR 122.41(f) and 122.62, and Part

6.I.1 of this Order. Additionally, 40 CFR 122.44(d)(1)(vii)(B) requires that NPDES permits be consistent with the assumptions and requirements of any available waste load allocation. Tables 7-4.1, 7-4.2a, and 7-4.3 of the Basin Plan set forth the pertinent provisions of the Dry Weather Bacteria TMDL. Tables 7-5.1, 7-5.2, and 7-5.3 of the Basin Plan set forth the pertinent provisions of the MDR Bacteria TMDL. They require that during Summer Dry Weather there shall be no exceedances in the Wave Wash of the single sample or the geometric mean bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use in marine waters. Accordingly, a prohibition is included in this Order barring discharges from a MS4 to Santa Monica Bay or Marina del Rey Harbor that result in exceedance of these objectives. Since the TMDL and the WLAs contained therein are expressed as receiving water conditions, Receiving Water Limitations have been included in this Order that are consistent with and implement the zero exceedance day WLAs.

31. Pursuant to federal regulations at 40 CFR 124.8, and 125.56, Fact Sheets were prepared to provide the bases for incorporating the Dry Weather Bacteria TMDL and the MDR Bacteria TMDL into this Order. These Fact Sheets are hereby incorporated by reference into these findings.

32. The iterative approach to regulating municipal storm water is not an appropriate means

of implementing the Santa Monica Bay beaches or the MDR Summer Dry Weather WLAs for any and all of the following reasons: (a) The WLAs do not regulate the discharge of storm water; (b) The harm to the public from violating the WLAs is dramatic both in terms of health impacts to exposed beachgoers, and the economic cost to the region associated with related illnesses; (c) Under the iterative approach over three permit cycles, required elements of the MS4 permit (e.g., elimination of illicit connections/illicit discharges (IC/ID) into their MS4s, revisions to their SQMP, etc.) have not resulted in the elimination of exceedances of water quality standards at the beaches or in Basins D, E, and F of Marina del Rey Harbor.

33. On March 14, 2007, Marina del Rey watershed responsible agencies submitted to the Regional Board the results of a non-point source study conducted over a one year period between July 2005 and July 2006, which was required under the terms of the MDR TMDL. The study was designed to determine the relative bacterial loading to the harbor from sources including but not limited to storm drains, boats, birds, and other non-point sources. The study has not yet been peer reviewed, and is currently under review by Regional Board staff.

34. On January 8, 2007, as required by the MDR Bacterial TMDL, Marina del Rey watershed responsible agencies submitted to the Regional Board an implementation plan describing

the strategy by which they intend to comply with the MDR Bacterial TMDL. This implementation plan was developed through a process that included both Regional Board staff and representatives from Heal the Bay and Santa Monica Baykeeper.

35. The Regional Board acknowledges the County's timely submittals of reports required by the TMDL and implementation measures initiated thus far towards meeting water quality standards for bacteria in Marina del Rey. As a result of the adoption of the MDR Bacterial TMDL in 2003, the County has funded or received grants to initiate the following activities:

- Marina Beach Water Quality Improvement Project, Phase I and Phase II through a CBI grant;
- Mothers' Beach and Back Basins Bacterial TMDL Non-point Source Study;
- Marina del Rey Harbor Mothers' Beach and Back Basins Report of Small Drain Identification;
- Marina del Rey Vessel Discharge Report;
- Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Monitoring Plan; and
- Three low-flow diversion projects, which were partially funded by a grant, two of which have been completed.

In addition to participation in the above studies, the County and other Marina del Rey watershed responsible agencies continue to implement BMPs proposed in the January 8, 2007, Implementation Plan.

36. The Receiving Water Limitations have been revised to implement the Summer Dry Weather WLAs set forth in Basin Plan Tables 7-4.1 and 7-5.1. These Receiving Water Limitations apply at the compliance monitoring sites identified in the *Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan* dated April 7, 2004[1] and the *Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Monitoring Plan* dated April 13, 2007. Compliance with the Receiving Water Limitations shall be determined using monitoring data obtained in conformance with the *Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan* dated April 7, 2004; the *Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Monitoring Plan* dated April 13, 2007; and the Monitoring and Reporting Program CI 6948.

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[1] If the Regional Board determines that publicly owned storm drains that flow during dry weather are situated at additional shoreline locations, the *Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan* may be revised by the Regional Board Executive Officer approval, after providing the opportunity for public comment, to include these locations as compliance monitoring sites.

37. If the Receiving Water Limitations are exceeded at a compliance monitoring site, the Regional Board will generally issue an appropriate investigative order pursuant to Cal. Water Code § 13267 or § 13225 to the Permittees and other responsible agencies or jurisdictions within the relevant subwatershed to determine the source of the exceedance. Following these actions, Regional Board staff will generally evaluate the need for further enforcement as follows:

    a) If the Regional Board determines that the exceedance did not result from discharges from the MS4, then the MS4 Permittees would not be responsible for violations of these provisions.

    b) If the Regional Board determines that Permittees in the relevant subwatershed have demonstrated that their MS4 does not discharge dry weather flow into Santa Monica Bay or Basins D, E, or F in Marina del Rey Harbor, those Permittees would not be responsible for violations of these provisions even if the Receiving Water Limitations are exceeded at an associated compliance monitoring site.

    c) If the Regional Board determines that Permittees in the relevant subwatershed have demonstrated that their MS4 summer dry weather discharge into Santa Monica Bay or Basins D, E, or F in Marina del Rey Harbor is treated to a level that does not exceed either the single

sample or the geometric mean bacteria objectives, those Permittees shall not be responsible for violations of these provisions even if the Receiving Water Limitations are exceeded at an associated compliance monitoring site.

d) If the Regional Board determines that one or more Permittees have caused or contributed to violations of these Receiving Water Limitations, the Regional Board will consider appropriate enforcement action, including a cease and desist order with or without a time schedule for compliance, or other appropriate enforcement action depending upon the circumstances and the extent to which the Permittee(s) has endeavored to comply with these provisions.

38. A Permittee would not be responsible for violations of these provisions if the Regional Board Executive Officer determines that the Permittee has adequately documented through a source investigation of the subwatershed, pursuant to protocols established under Cal. Water Code 13178, that bacterial sources originating within the jurisdiction of the Permittee have not caused or contributed to the exceedance of the Receiving Water Limitations.

39. Water Code section 13389 exempts the Regional Board from compliance with Chapter 3 (commencing with Section 21100) of Division 13 of the Public Resources Code prior to

the adoption of waste discharge requirements. Therefore the Regional Board is not required to prepare environmental documents to evaluate this permit modification. Nevertheless, the Regional Board has considered the policies and requirements set forth in Chapters 1 through 2.6 of CEQA, and further, has considered the final substitute environmental documents for the Santa Monica Bay Beaches Bacteria TMDL and the MDR Bacteria TMDL.

F. Implementation

1. The California Environmental Quality Act (CEQA) (Cal. Pub. Resources Code § 21000 *et seq.*) requires that public agencies consider the environmental impacts of the projects they approve for development. CEQA applies to projects that are considered discretionary and does not apply to ministerial projects, which involve the use of established standards or objective measurements. A ministerial project may be made discretionary by adopting local ordinance provisions or imposing conditions to create decision-making discretion in approving the project. In the alternative, Permittees may establish standards and objective criteria administratively for storm water mitigation for ministerial projects. For water quality purposes, the Regional Board considers that all new development and significant redevelopment activity in specified categories, that receive approval or

permits from a municipality, are subject to storm water mitigation requirements.

2. The objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County. To meet this objective, this Order requires that the SQMP specify BMPs that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable. Further, Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited.

3. The SQMP required in this Order builds upon the programs established in Order Nos. 90-079, and 96-054, consists of the components recommended in the USEPA guidance manual, and was developed with the cooperation of representatives from the regulated community and environmental groups. The SQMP includes provisions that promote customized initiatives, both on a countywide and watershed basis, in developing and implementing cost-effective measures to minimize discharge of pollutants to the receiving water. The various components of the SQMP, taken as a whole rather than individually, are expected to reduce pollutants in storm water and urban runoff to the maximum extent practicable. Provisions of the SQMP are

fully enforceable under provisions of this Order.

4. The emphasis of the SQMP is pollution prevention through education, public outreach, planning, and implementation as source control BMPs first and then Structural and Treatment Control BMPs next. Successful implementation of the provisions of the SQMP will require cooperation and coordination of all public agencies in each Permittee's organization, among Permittees, and with the regulated community.

5. The implementation of a Public Information and Participation Program is a critical component of a storm water management program. An informed and knowledgeable community is critical to the success of a storm water management program since it helps insure the following: (i) greater support for the program as the public gains a greater understanding of the reasons why it is necessary and important, and (ii) greater compliance with the program as the public becomes aware of the personal responsibilities expected of them and others in the community, including the individual actions they can take to protect or improve the quality of area waters.

6. This Order includes a Monitoring Program that incorporates Minimum Levels (MLs) established under the SIP. The SIP's MLs represent the lowest quantifiable concentration for priority toxic pollutants that is measurable with the use of proper method-based

analytical procedures and factoring out matrix interference. The SIP's MLs therefore represent the best available science for determining MLs and are appropriate for a storm water monitoring program. The use of MLs allows the detection of toxic priority pollutants at concentrations of concern using recent advances in chemical analytical methods.

7. This Order provides flexibility for Permittees to petition the Regional Board Executive Officer to substitute a BMP under the SQMP with an alternative BMP, if they can provide information and documentation on the effectiveness of the alternative, equal to or greater than the prescribed BMP in meeting the objectives of this Order.

8. This Order contemplates that the Permittees are responsible for considering potential storm water impacts when making planning decisions in order to fulfill the Permittees' CWA requirement to reduce the discharge of pollutants in municipal storm water to the MEP from new development and redevelopment activities. However, the Permittees retain authority to make the final land-use decisions and retain full statutory authority for deciding what land uses are appropriate at specific locations within each Permittee's jurisdiction. This Order and its requirements are not intended to restrict or control local land use decision-making authority.

9. This Order is not intended to prohibit the inspection for or abatement of vectors by the

State Department of Health Services or local vector agencies in accordance with Cal. Health and Safety Code § 2270 *et seq.* and §116110 *et seq.* Certain Treatment Control BMPs if not properly designed, operated or maintained may create habitats for vectors (e.g. mosquito and rodents). This Order contemplates that the Permittees will closely cooperate and collaborate with local vector control agencies and the State Department of Health Services for the implementation, operation, and maintenance of Treatment Control BMPs in order to minimize the risk to public health from vector borne diseases.

G. Public Process

1. The Regional Board has notified the Permittees and interested agencies and persons of its intent to issue waste discharge requirements for this discharge, and has provided them with an opportunity to submit their written view and recommendations.

2. The Regional Board, in a public hearing, heard and considered all comments pertaining to the discharge and to the tentative requirements.

3. The Regional Board has conducted public workshops to discuss drafts of the permit. On April 24, 2001, Regional Board staff conducted a workshop outlining the reasoning behind the changes proposed for the new permit and received input from the Permittees and the public regarding those proposed changes. On

July 26, 2001, a second public workshop was held at a special Regional Board meeting. The Permittees and the public had another opportunity to express their opinions regarding the proposed changes to the permit in front of the Regional Board members. A significant number of working meetings with the Permittees and other interested parties have occurred throughout the period from the submittal of the ROWD and completion of the tentative draft, in an attempt to incorporate and address all the comments presented.

4. The Los Angeles County Flood Control District, the County of Los Angeles and the other municipalities are co-permittees as defined in 40 CFR 122.26(b)(1). Los Angeles County Flood Control District will coordinate with the other municipalities and facilitate program implementation. Each Permittee is responsible only for a discharge for which it is the operator.

5. This Order shall serve as a NPDES Permit, pursuant to CWA § 402, or amendments thereto, and shall take effect 50 days from Order adoption provided the Regional Administrator of the USEPA has no objections.

6. The action to adopt an NPDES permit is exempt from the provisions of Chapter 3 of CEQA (Cal. Pub. Resources Code § 21100 *et seq.*), in accordance with CWC § 13389.

7. Pursuant to CWC §13320, any aggrieved party may seek review of this Order by filing

a petition with the State Board. A petition must be sent to: State Water Resources Control Board, P.O. Box 100, Sacramento, California, 95812, within 30 days of adoption of the Order by the Regional Board.

8. This Order may be modified or alternatively revoked or reissued prior to its expiration date, in accordance with the procedural requirements of the NPDES program, and the CWC for the issuance of waste discharge requirements.

IT IS HEREBY ORDERED that the Los Angeles County Flood Control District, Los Angeles County, and the Cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bell, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Cañada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South

Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier, in order to meet the provisions contained in Division 7 of the CWC and regulations adopted thereunder, and the provisions of the CWA, as amended, and regulations and guidelines adopted thereunder, shall comply with the following:

Part 1. DISCHARGE PROHIBITIONS

Part 1. A. The Permittees shall effectively prohibit non-storm water discharges into the MS4 and watercourses, except where such discharges:

1. Are covered by a separate individual or general NPDES permit for non-storm water discharges; or

2. Fall within one of the categories below, and meet all conditions when specified by the Regional Board Executive Officer:

   a) Category A – Natural flow:

      (1) Natural springs and rising ground water;

      (2) Flows from riparian habitats or wetlands;

      (3) Stream diversions, permitted by the State Board; and

      (4) Uncontaminated ground water infiltration [as defined by 40 CFR 35.2005(20)].

b) Category B – Flows from emergency fire fighting activity.

c) Category C – Flows incidental to urban activities:

(1) Reclaimed and potable landscape irrigation runoff;

(2) Potable drinking water supply and distribution system releases (consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices);

(3) Drains for foundations, footings, and crawl spaces;

(4) Air conditioning condensate;

(5) Dechlorinated/debrominated swimming pool discharges;

(6) Dewatering of lakes and decorative fountains;

(7) Non-commercial car washing by residents or by non-profit organizations; and

(8) Sidewalk rinsing.

The Regional Board Executive Officer may add or remove categories of non-storm water discharges above. Furthermore, in the event that any of the above categories of non-storm water discharges are determined to be a source of pollutants by the Regional Board Executive Officer, the discharge will no longer be exempt from this prohibition unless the Permittee implements conditions

approved by the Regional Board Executive Officer to ensure that the discharge is not a source of pollutants. Notwithstanding the above, the Regional Board Executive Officer may impose additional prohibitions of non-storm water discharges in consideration of antidegradation policies and TMDLs.

Part 1. B. Discharges of Summer Dry Weather flows from MS4s into Santa Monica Bay[2] or into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach, that cause or contribute to exceedances of the bacteria Receiving Water Limitations in Part 2.5 and 2.6 below, are prohibited.[3]

Part 2. RECEIVING WATER LIMITATIONS

1. Except as provided in Part 2.5 and 2.6 below, discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.

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[2] Santa Monica Bay encompasses the coastal waters from Point Dume to Point Fermin and seaward to the 500-meter depth contour. It includes all beaches from the Los Angeles/ Ventura County line south to the Outer Cabrillo Beach located just south of the Palos Verdes Peninsula.

[3] Responsibility for such prohibited discharges is determined as indicated in Footnote 3 part (2) of Table 7-4.1 and Footnote 2 part (1) of Table 7-5.1 of the Basin Plan. All Permittees within a subwatershed of the Santa Monica Bay Watershed Management Area are jointly responsible for compliance with the limitations imposed in Tables 7-4.1 and 7-5.1 of the Basin Plan.

2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.

3. The Permittees shall comply with Part 2.1. and 2.2. through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQMP and its components and other requirements of this Order including any modifications. The SQMP and its components shall be designed to achieve compliance with receiving water limitations. If exceedances of Water Quality Objectives or Water Quality Standards (collectively, Water Quality Standards) persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit, the Permittee shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure:

   a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report (as described in the Program Reporting Requirements, Section I of the Monitoring and Reporting Program) to the Regional Board that describes BMPs that are currently being

implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards. This RWL Compliance Report may be incorporated in the annual Storm Water Report and Assessment unless the Regional Board directs an earlier submittal. The RWL Compliance Report shall include an implementation schedule. The Regional Board may require modifications to the RWL Compliance Report.

b) Submit any modifications to the RWL Compliance Report required by the Regional Board within 30 days of notification.

c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.

d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.

4. So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat

the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs.

5. During Summer Dry Weather there shall be no discharges of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash, of the applicable bacteria objectives. The applicable bacteria objectives include both the single sample and geometric mean bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use, as set forth in the Basin Plan.[4]

6. During Summer Dry Weather there shall be no discharges of bacteria from MS4s into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach that cause or contribute to exceedances of the applicable bacteria objectives. The applicable bacteria objectives include both the single sample and geometric mean bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use, as set forth in the Basin Plan.[5]

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[4] Samples collected for determining compliance with the receiving water limitations of Part 2.5 shall be processed in accordance with the sampling procedures and analytical methodology set forth in the *Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan* dated April 7, 2004 and the Monitoring and Reporting Program CI 6948.

[5] Samples collected for determining compliance with the receiving water limitations of Part 2.6 shall be processed in

(Continued on following page)

Part 3. STORM WATER QUALITY MANAGEMENT PROGRAM (SQMP) IMPLEMENTATION

A. General Requirements

1. Each Permittee shall, at a minimum, implement the SQMP. The SQMP is an enforceable element of this Order. The SQMP shall be implemented no later than February 1, 2002, unless a later date has been specified for a particular provision in this Order.

2. The SQMP shall, at a minimum, comply with the applicable storm water program requirements of 40 CFR 122.26(d)(2). The SQMP and its components shall be implemented so as to reduce the discharges of pollutants in storm water to the MEP.

3. Each Permittee shall implement additional controls, where necessary, to reduce the discharges of pollutants in storm water to the MEP.

4. Permittees that modify the countywide SQMP (i.e., implement additional controls, implement different controls than described in the countywide SQMP, or determine that certain BMPs in the countywide SQMP are not applicable in the area under its jurisdiction),

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accordance with the sampling procedures and analytical methodology set forth in the *Marina del Rey Harbor Mothers' Beach and Back Basins Bacterial TMDL Coordinated Shoreline Monitoring Plan* dated April 13, 2007 and the Monitoring and Reporting Program CI 6948.

shall develop a local SQMP, no later than August 1, 2002. The local SQMP shall be customized to reflect the conditions in the area under the Permittee's jurisdiction and shall specify activities being implemented under the appropriate elements described in the countywide SQMP.

B. Best Management Practice Implementation

The Permittees shall implement or require the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control. When implemented, BMPs are intended to result in the reduction of pollutants in storm water to the MEP.

C. Revision of the Storm Water Quality Management Program

The Permittees shall revise the SQMP, at the direction of the Regional Board Executive Officer, to incorporate program implementation amendments so as to comply with regional, watershed specific requirements, and/or waste load allocations developed and approved pursuant to the process for the designation and implementation of Total Maximum Daily Loads (TMDLs) for impaired water bodies.

D. Designation and Responsibilities of the Principal Permittee

The Los Angeles County Flood Control District is hereby designated as the Principal Permittee. As such, the Principal Permittee shall:

1. Coordinate and facilitate activities necessary to comply with the requirements of this Order, but is not responsible for ensuring compliance of any individual Permittee;

2. Coordinate permit activities among Permittees and act as liaison between Permittees and the Regional Board on permitting issues;

3. Provide personnel and fiscal resources for the necessary updates of the SQMP and its components;

4. Provide technical and administrative support for committees that will be organized to implement the SQMP and its components;

5. Convene the Watershed Management Committees (WMCs) constituted pursuant to Part F, below, upon designation of representatives;

6. Implement the Countywide Monitoring Program required under this Order and evaluate, assess and synthesize the results of the monitoring program;

7. Provide personnel and fiscal resources for the collection, processing and submittal to the Regional Board of annual reports and summaries of other reports required under the SQMP; and

8. Comply with the "Responsibilities of the Permittees" in Part 3.E., below.

E. Responsibilities of the Permittees

Each Permittee is required to comply with the requirements of this Order applicable to discharges within its boundaries (see Findings D.1, D.2. and D.3.) and not for the implementation of the provisions applicable to the Principal Permittee or other Permittees. Each Permittee shall, within its geographic jurisdiction:

1. Comply with the requirements of the SQMP and any modifications thereto;

2. Coordinate among its internal departments and agencies, as appropriate, to facilitate the implementation of the requirements of the SQMP applicable to such Permittee in an efficient and cost-effective manner;

3. Designate a technically knowledgeable representative to the appropriate WMC;

4. Participate in intra-agency coordination (e.g. Fire Department, Building and Safety, Code Enforcement, Public Health, etc.) necessary to successfully implement the provisions of this Order and the SQMP.

5. Prepare an annual Budget Summary of expenditures applied to the storm water management program. This summary shall identify the storm water budget for the following year, using estimated percentages

and written explanations where necessary, for the specific categories noted below:

a) Program management

- Administrative costs

b) Program Implementation

Where information is available, provide an estimated percent breakdown of expenditures for the categories below:

- Illicit connection/illicit discharge
- Development planning
- Development construction
- Construction inspection activities
- Industrial/Commercial inspection activities
- Public Agency Activities
  - Maintenance of Structural BMPs and Treatment Control BMPs
  - Municipal Street Sweeping
  - Catch basin clean-up
  - Trash collection
  - Capital costs

c) Public Information and Participation

d) Monitoring Program

e) Miscellaneous Expenditures

6. Each Permittee, in addition to the Budget Summary, shall report any supplemental dedicated budgets for the same categories.

F. Watershed Management Committees (WMCs)

1. Each WMC shall be comprised of a voting representative from each Permittee in the WMA.

2. The WMC's chair and secretary shall be chosen by the WMC upon Order adoption and on an annual basis, thereafter. In the absence of volunteer Permittee(s) for the positions, the Principal Permittee shall assume those roles until the WMC chooses members of the committee for the positions.

3. Each WMC shall:

   a) Facilitate cooperation and exchange of information among Permittees;

   b) Establish additional goals and objectives and associated deadlines for the WMA, as the program implementation progresses;

   c) Prioritize pollution control efforts based on beneficial use impairment(s), watershed characteristics and analysis of results from studies and the monitoring program;

   d) Develop and/or update and monitor the adequate implementation, on an annual

basis, of the tasks identified for the WMA;

e) Assess the effectiveness of, prepare revisions for, and recommend appropriate changes to the SQMP and its components;

f) Continue to prioritize the Industrial/Commercial critical sources for investigation, outreach and follow-up; and

g) Meet four times per year and, as necessary.

G. Legal Authority

1. Permittees shall possess the necessary legal authority to prohibit non-storm water discharges to the storm drain system, including, but not limited to:

   a) Illicit discharges and illicit connections and require removal of illicit connections;

   b) The discharge of wash waters to the MS4 from the cleaning of gas stations, auto repair garages, or other types of automotive service facilities;

   c) The discharge of runoff to the MS4 from mobile auto washing, steam cleaning, mobile carpet cleaning, and other such mobile commercial and industrial operations;

d) The discharge of runoff to the MS4 from areas where repair of machinery and equipment which are visibly leaking oil, fluid or antifreeze, is undertaken;

e) The discharge of runoff to the MS4 from storage areas of materials containing grease, oil, or other hazardous substances, and uncovered receptacles containing hazardous materials;

f) The discharge of chlorinated/ brominated swimming pool water and filter back-wash to the MS4;

g) The discharge of runoff from the washing of toxic materials from paved or unpaved areas to the MS4;

h) Washing impervious surfaces in industrial/ commercial areas that results in a discharge of runoff to the MS4;

i) The discharge of concrete or cement laden wash water from concrete trucks, pumps, tools, and equipment to the MS4; and

j) Dumping or disposal of materials into the MS4 other than storm water, such as:

(1) Litter, landscape debris and construction debris;

(2) Any state or federally banned or unregistered pesticides;

(3) Food and food processing wastes; and

(4) Fuel and chemical wastes, animal wastes, garbage, batteries, and other materials that have potential adverse impacts on water quality.

2. The Permittees shall possess adequate legal authority to:

a) Require persons within their jurisdiction to comply with conditions in Permittees' ordinances, permits, contracts, model programs, or orders (i.e. hold dischargers to its MS4 accountable for their contributions of pollutants and flows);

b) Utilize enforcement mechanisms to require compliance with Permittees ordinances, permits, contracts, or orders;

c) Control pollutants, including potential contribution, in discharges of storm water runoff associated with industrial activities (including construction activities) to its MS4 and control the quality of storm water runoff from industrial sites (including construction sites). This requirement applies to Source Control, and Treatment Control BMPs;

d) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions, including the prohibition of illicit discharges to the MS4. Permittees must possess authority to enter, sample, inspect, review and copy records, and require regular reports

from industrial facilities (including construction sites) discharging polluted or with the potential to discharge polluted storm water runoff into its MS4;

e) Require the use of BMPs to prevent or reduce the discharge of pollutants to MS4s to MEP; and

f) Require that Treatment Control BMPs be properly operated and maintained to prevent the breeding of vectors.

3. Each Permittee shall, no later than November 1, 2002, amend and adopt (if necessary), a Permittee-specific storm water and urban runoff ordinance to enforce all requirements of this permit.

4. Each Permittee shall submit no later than December 2, 2002, a new or updated statement by its legal counsel that the Permittee has obtained all necessary legal authority to comply with this Order through adoption of ordinances and/or municipal code modifications.

Part 4. SPECIAL PROVISIONS

Maximum Extent Practicable Standard

This permit, and the provisions herein, are intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP from the

permitted areas in the County of Los Angeles to the waters of the State.

A. General Requirements

1. Best Management Practice Substitution

   The Regional Board Executive Officer may approve any site-specific BMP substitution upon petition by a Permittee(s), if the Permittee can document that:

   a) The proposed alternative BMP or program will meet or exceed the objective of the original BMP or program in the reduction of storm water pollutants; or

   b) The fiscal burden of the original BMP or program is substantially greater than the proposed alternative and does not achieve a substantially greater improvement in storm water quality; and,

   c) The proposed alternative BMP or program will be implemented within a similar period of time.

B. Public Information and Participation Program (PIPP)

The Principal Permittee shall implement a Public Information and Participation Program (PIPP) that includes, but is not limited to, the requirements listed in this section. The Principal Permittee shall be responsible for developing and implementing the Public Education Program, as

described in the SQMP, and shall coordinate with Permittees to implement specific requirements.

The objectives of the PIPP are as follows:

- To measurably increase the knowledge of the target audiences regarding the MS4, the impacts of storm water pollution on receiving waters, and potential solutions to mitigate the problems caused;
- To measurably change the waste disposal and runoff pollution generation behavior of target audiences by encouraging implementation of appropriate solutions; and
- To involve and engage socio-economic groups and ethnic communities in Los Angeles County to participate in mitigating the impacts of storm water pollution.

The Principal Permittee shall convene an advisory committee to provide input and assistance in meeting the goals and objectives of the public education campaign. The advisory committee shall be consulted during the process of developing the PIPP campaign, and shall provide comments and advice during the process of preparing a Request For Proposals for a storm water public education contractor. The committee may participate as a part of a working group that evaluates contractor proposals and other tasks as appropriate. The committee shall be comprised of representatives of the environmental community, Permittee cities, Regional Board staff, and experts in the

fields of public education and marketing. The Principal Permittee shall ensure that the committee meets at least once a year.

1. Residential Program

   a) "No Dumping" Message

      Each Permittee shall mark all storm drain inlets that they own with a legible "no dumping" message. In addition, signs with prohibitive language discouraging illegal dumping must be posted at designated public access points to creeks, other relevant water bodies, and channels no later than February 2, 2004. Signage and storm drain messages shall be legible and maintained as necessary during the term of the permit.

   b) Countywide Hotline

      The 888-CLEAN-LA hotline will serve as the general public reporting contact for reporting clogged catch basin inlets and illicit discharges/dumping, faded or lack of catch basin stencils, and general storm water management information. Each Permittee may establish its own hotline if preferred. Permittees shall include this information, updated when necessary, in public information, and the government pages of the telephone book, as they are developed or published. The Principal Permittee shall compile a list of the general public reporting contacts from all Permittees and make this information

available on the web site (888CleanLA.com) and upon request. Permittees shall provide the Principal Permittee with their reporting contacts no later than March 1, 2002. Permittees are responsible for providing current, updated information to the Principal Permittee.

c) Outreach and Education

(1) The Principal Permittee shall continue to implement the following activities that were components of the first five-year PIPP:

(i) Advertising;

(ii) Media relations;

(iii) Public service announcements;

(iv) "How To" instructional material distributed in a targeted and activity-related manner;

(v) Corporate, community association, environmental organization and entertainment industry tie-ins; and

(vi) Events targeted to specific activities and population subgroups.

(2) The Principal Permittee shall develop a strategy to educate ethnic communities and businesses through culturally effective methods. Details of this strategy should be incorporated into the Public Education Program, and implemented, no later than February 3, 2003.

(3) The Principal Permittee shall enhance the existing outreach efforts to residents and businesses related to the proper disposal of cigarette butts.

(4) Each Permittee shall conduct educational activities within its jurisdiction and participate in countywide events.

(5) The Principal Permittee shall organize Public Outreach Strategy meetings for Permittees on a quarterly basis, beginning no later than May 1, 2002. The Principal Permittee shall provide guidance for Permittees to augment the countywide outreach and education program. Permittees shall coordinate regional and local outreach and education to reduce duplication of efforts. Permittees are encouraged to include other interested parties in the outreach strategy to strengthen and coordinate educational efforts.

(6) The Principal Permittee shall ensure that a minimum of 35 million impressions per year are made on the general public about storm water quality via print, local TV access, local radio, or other appropriate media.

(7) The Principal Permittee, in cooperation with the Permittees, shall provide schools within each School District in the County with materials, including, but not limited to, videos, live presentations, and other information necessary

to educate a minimum of 50 percent of all school children (K-12) every 2 years on storm water pollution.

(8) Permittees shall provide the contact information for their appropriate staff responsible for storm water public education activities to the Principal Permittee no later than April 1, 2002, and changes to contact information no later than 30 days after a change occurs.

(9) The Principal Permittee shall develop a strategy to measure the effectiveness of in-school educational programs. The protocol shall include assessment of students' knowledge of storm water pollution problems and solutions before and after educational efforts are conducted. The protocol shall be developed and submitted to the Regional Board Executive Officer for approval no later than May 1, 2002. It shall be implemented upon approval.

(10) In order to ensure that the PIPP is demonstrably effective in changing the behavior of the public, the Principal Permittee shall develop a behavioral change assessment strategy no later than May 1, 2002. The strategy shall be developed based on sociological data and studies (such as the County Segmentation Study). The Principal Permittee shall submit the assessment strategy to the Regional Board Executive Office for

approval. It shall be implemented on approval.

d) Pollutant-Specific Outreach

The Principal Permittee, in cooperation with Permittees, shall coordinate to develop outreach programs that focus on the watershed-specific pollutants listed in Table 1 no later than February 3, 2003. Metals may be appropriately addressed through the Industrial/Commercial Facilities Program (e.g. distribute education materials on appropriate BMPs for metal waste management to facilities that have been identified as a potential source, such as metal fabricating facilities). Region-wide pollutants may be included in the Principal Permittee's mass media outreach efforts.

Table 1.	
Watershed	***Target Pollutants for Outreach***
Ballona Creek	Trash, Indicator Bacteria, Metals, PAHs
Malibu Creek	Trash, Nutrients (Nitrogen), Indicator Bacteria, Sediments
Los Angeles River	Trash, Nutrients (Nitrogen), Indicator Bacteria, Metals, Pesticides, PAHs
San Gabriel River	Trash, Nutrients (Nitrogen), Indicator Bacteria, Metals

Santa Clara River	Nutrients (Nitrogen), Coliform
Dominguez Channel	Trash, Indicator Bacteria, PAHs

Each Permittee shall make outreach materials available to the general public and target audiences, such as schools, community groups, contractors and developers, and at appropriate public counters and events. Outreach material shall include information on pollutants, sources of concern, and source abatement measures.

2. Businesses Program

a) Corporate Outreach

The Principal Permittee shall develop and implement a Corporate Outreach program to educate and inform corporate managers about storm water regulations. The program shall target RGOs and restaurant chains. At a minimum, this program shall include:

(1) Conferring with corporate management to explain storm water regulations;

(2) Distribution and discussion of educational material regarding storm water pollution and BMPs, and provide managers with suggestions to facilitate employee compliance with storm water regulations.

Corporate Outreach for all RGOs and restaurant chain corporations shall be conducted not less than twice during the permit term, with the first outreach contact to begin no later than February 3, 2003.

b) Business Assistance Program

The Principal Permittee and Permittees may implement a Business Assistance Program to provide technical resource assistance to small businesses to advise them on BMPs implementation to reduce the discharge of pollutants in storm water runoff. Programs may include:

(1) On-site technical assistance or consultation via telephone to identify and implement storm water pollution prevention methods and best management practices; and

(2) Making available, distributing, and discussing of applicable BMF and educational materials.

C. Industrial/Commercial Facilities Control Program

Each Permittee shall require implementation of pollutant reduction and control measures at industrial and commercial facilities, with the objective of reducing pollutants in storm water runoff. Except as specified in other sections of this Order, pollutant reduction and control measures can be used alone or in combination, and can

include Structural and Source Control BMPs, and operation and maintenance procedures, which can be applied before, during, and/or after pollution generating activities. At a minimum, the Industrial/Commercial Facilities Control Program shall include requirements to: (1) track, (2) inspect, and (3) ensure compliance at industrial and commercial facilities that are critical sources of pollutants in storm water.

1. Track Critical Sources

a) Each Permittee shall maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of storm water pollution. Critical sources to be tracked are summarized below, and also specified in Attachment B:

(1) Commercial Facilities

- restaurants;
- automotive service facilities; and
- RGOs and automotive dealerships.

(2) USEPA Phase I Facilities (Tier 1 and 2)

(3) Other Federally-mandated Facilities [as specified in 40 CFR 122.26(d)(2)(iv)(C)]

- municipal landfills;
- hazardous waste treatment, disposal, and recovery facilities; and
- facilities subject to SARA Title III (also known as EPCRA).

b) Each Permittee shall include the following minimum fields of information for each industrial and commercial facility:

- name of facility and name of owner/operator;
- address;
- coverage under the GIASP or other individual or general NPDES permits; and
- a narrative description including SIC codes that best reflects the industrial activities at and principal products of each facility.

The Regional Board encourages Permittees to add other fields of information, such as material usage and/or industrial output, and discrepancies between SIC Code designations (as reported by facility operators) and the actual type of industrial activity has the potential to pollute storm water. In addition, the Regional Board recommends use of an automated database system, such as a Geographical Information System (GIS) or Internet-based system; however, this is not required.

c) Each Permittee shall update its inventory of critical sources at least annually. The update may be accomplished through collection of new information obtained through field activities or through other readily available intra-agency informational databases (e.g. business licenses, pretreatment permits, sanitary sewer hook-up permits).

2. Inspect Critical Sources

Each Permittee shall inspect all facilities in the categories and at a level and frequency as specified in the following subsections.

a) Commercial Facilities

(1) Restaurants

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of inspections: Each Permittee, in cooperation with its appropriate department (such as health or public works), shall inspect all restaurants within its jurisdiction to confirm that storm water BMPs are being effectively implemented in compliance with State law, County

and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each restaurant, inspectors shall verify that the restaurant operator:

- has received educational materials on storm water pollution prevention practices;
- does not pour oil and grease or oil and grease residue onto a parking lot, street or adjacent catch basin;
- keeps the trash bin area clean and trash bin lids closed, and does not fill trash bins with washout water or any other liquid;
- does not allow illicit discharges, such as discharge of washwater from floormats, floors, porches, parking lots, alleys, sidewalks and street areas (in the immediate vicinity of the establishment), filters or garbage/trash containers;
- removes food waste, rubbish or other materials from parking lot areas in a sanitary manner that does not create a nuisance or discharge to the storm drain.

(2) Automotive Service Facilities

Frequency of Inspections: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of inspections: Each Permittee shall inspect all automotive service facilities within its jurisdiction to confirm that storm water BMPs are effectively implemented in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP. At each automotive service facility, inspectors shall verify that each operator:

- maintains the facility area so that it is clean and dry and without evidence of excessive staining;
- implements housekeeping BMPs to prevent spills and leaks;
- properly discharges wastewaters to a sanitary sewer and/or contains wastewaters for transfer to a legal point of disposal;
- is aware of the prohibition on discharge of non-storm water to the storm drain;

- properly manages raw and waste materials including proper disposal of hazardous waste;
- protects outdoor work and storage areas to prevent contact of pollutants with rainfall and runoff;
- labels, inspects, and routinely cleans storm drain inlets that are located on the facility's property; and
- trains employees to implement storm water pollution prevention practices.

(3) Retail Gasoline Outlets and Automotive Dealerships

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that BMPs are being effectively implemented at each RGO and automotive dealership within its jurisdiction, in compliance with the SQMP, Regional Board Resolution 98-08, and the Stormwater Quality Task Force Best Management

Practice Guide for RGOs. At each RGO and automotive dealership, inspectors shall verify that each operator:

- routinely sweeps fuel-dispensing areas for removal of litter and debris, and keeps rags and absorbents ready for use in case of leaks and spills;
- is aware that washdown of facility area to the storm drain is prohibited;
- is aware of design flaws (such as grading that doesn't prevent run-on, or inadequate roof covers and berms), and that equivalent BMPs are implemented;
- inspects and cleans storm drain inlets and catch basins within each facility's boundaries no later than October 1st of each year;
- posts signs close to fuel dispensers, which warn vehicle owners/operators against "topping off" of vehicle fuel tanks and installation of automatic shutoff fuel dispensing nozzles;
- routinely checks outdoor waste receptacle and air/water supply areas, cleans leaks and drips, and ensures that only watertight

waste receptacles are used and that lids are closed; and

- trains employees to properly manage hazardous materials and wastes as well as to implement other storm water pollution prevention practices.

b) Phase I Facilities

Permittees need not inspect facilities that have been inspected by the Regional Board within the past 24 months. For the remaining Phase I facilities that the Regional Board has not inspected, each Permittee shall conduct compliance inspections as specified below.

Frequency of Inspection

Facilities in Tier 1 Categories: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Facilities in Tier 2 Categories: Twice during the 5-year term of the permit, provided that the first inspection occurs no later than August 1, 2004. Permittees need not perform additional inspections at those facilities determined to have no risk of exposure of industrial activity to

storm water. For those facilities that do have exposure of industrial activities to storm water, a Permittee may reduce the frequency of additional compliance inspections to once every 5 years, provided that the Permittee inspects at least 20% of the facilities in Tier 2 each year.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging storm water associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

c) Other Federally-mandated Facilities

Frequency of Inspection: Twice during the 5-year term of the Order, provided that the first inspection occurs no later than August 1, 2004, and that there is a minimum interval of one year in between the first compliance inspection and the second compliance inspection.

Level of Inspection: Each Permittee shall confirm that each operator:

- has a current Waste Discharge Identification (WDID) number for facilities discharging storm water associated with industrial activity, and that a Storm Water Pollution Prevention Plan is available on-site, and
- is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the SQMP.

3. Ensure Compliance of Critical Sources

a) **BMP Implementation:** In the event that a Permittee determines that a BMP specified by the SQMP or Regional Board Resolution 98-08 is infeasible at any site, that Permittee shall require implementation of other BMPs that will achieve the equivalent reduction of pollutants in the storm water discharges. Likewise, for those BMPs that are not adequate to achieve water quality objectives, Permittees may require additional site-specific controls, such as Treatment Control BMPs.

b) **Environmentally Sensitive Areas and Impaired Waters:** For critical sources that are in ESAs or that are tributary to CWA § 303(d) impaired water bodies, Permittees shall consider requiring operators to implement additional controls to reduce pollutants in storm water runoff that are causing or

contributing to the exceedences of Water Quality Objectives.

c) **Progressive Enforcement:** Each Permittee shall implement a progressive enforcement policy to ensure that facilities are brought into compliance with all storm water requirements within a reasonable time period as specified below.

(1) In the event that a Permittee determines, based on an inspection conducted above, that an operator has failed to adequately implement all necessary BMPs, that Permittee shall take progressive enforcement action which, at a minimum, shall include a follow-up inspection within 4 weeks from the date of the initial inspection.

(2) In the event that a Permittee determines that an operator has failed to adequately implement BMPs after a follow-up inspection, that Permittee shall take further enforcement action as established through authority in its municipal code and ordinances or through the judicial system.

(3) Each Permittee shall maintain records, including inspection reports, warning letters, notices of violations, and other enforcement records, demonstrating a good faith effort to bring facilities into compliance.

d) Interagency Coordination

(1) **Referral of Violations of the SQMP, Regional Board Resolution 98-08, and Municipal Storm Water Ordinances:** A Permittee may refer a violation(s) to the Regional Board provided that that Permittee has made a good faith effort of progressive enforcement. At a minimum, a Permittee's good faith effort must include documentation of:

- Two follow-up inspections, and
- Two warning letters or notices of violation.

(2) **Referral of Violations of the GIASP, including Requirements to File a Notice of Intent:** For those facilities in violation of the GIASP, Permittees may escalate referral of such violations to the Regional Board after one inspection and one written notice to the operator regarding the violation. In making such referrals, Permittees shall include, at a minimum, the following documentation:

- Name of the facility;
- Operator of the facility;
- Owner of the facility;
- Industrial activity being conducted at the facility that is subject to the GIASP; and

- Records of communication with the facility operator regarding the violation, which shall include at least an inspection report and one written notice of the violation.

Permittees shall, at a minimum, make such referrals on a quarterly basis.

(3) **Investigation of Complaints Regarding Facilities – Transmitted by the Regional Board Staff:** Each Permittee shall initiate, within one business day, investigation of complaints (other than non-storm water discharges) regarding facilities within its jurisdiction. The initial investigation shall include, at a minimum, a limited inspection of the facility to confirm the complaint to determine if the facility is effectively complying with the SQMP and municipal storm water/ urban runoff ordinances, and to oversee corrective action.

(4) **Support of Regional Board Enforcement Actions:** As directed by the Regional Board Executive Officer, Permittees shall support Regional Board enforcement actions by: assisting in identification of current owners, operators, and lessees of facilities; providing staff, when available, for joint inspections with Regional Board inspectors; appearing as witnesses in Regional Board enforcement hearings; and providing copies of

inspection reports and other progressive enforcement documentation.

(5) **Participation in a Task Force:** The Permittees, Regional Board, and other stakeholders may form a Storm Water Task Force, the purpose of which is to communicate concerns regarding special cases of storm water violations by industrial and commercial facilities and to develop a coordinated approach to enforcement action.

D. Development Planning Program

The Permittees shall implement a development-planning program that will require all Planning Priority development and Redevelopment projects to:

- Minimize impacts from storm water and urban runoff on the biological integrity of Natural Drainage Systems and water bodies in accordance with requirements under CEQA (Cal. Pub. Resources Code § 21100), CWC § 13369, CWA § 319, CWA § 402(p), CWA § 404, CZARA § 6217(g), ESA § 7, and local government ordinances ;
- Maximize the percentage of pervious surfaces to allow percolation of storm water into the ground;
- Minimize the quantity of storm water directed to impervious surfaces and the MS4;
- Minimize pollution emanating from parking lots through the use of appropriate Treatment

Control BMPs and good housekeeping practices;

- Properly design and maintain Treatment Control BMPs in a manner that does not promote the breeding of vectors; and
- Provide for appropriate permanent measures to reduce storm water pollutant loads in storm water from the development site.

1. Peak Flow Control

The Permittees shall control post-development peak storm water runoff discharge rates, velocities, and duration (peak flow control) in Natural Drainage Systems (i.e., mimic pre-development hydrology) to prevent accelerated stream erosion and to protect stream habitat. Natural Drainage Systems are located in the following areas:

a) Malibu Creek;

b) Topanga Canyon Creek;

c) Upper Los Angeles River;

d) Upper San Gabriel River;

e) Santa Clara River; and

f) Los Angeles County Coastal streams (see Basin Plan Table 2-1).

The Principal Permittee in consultation with Permittees shall develop numerical criteria for peak flow control, based on the results of the Peak Discharge Impact Study (see Monitoring Program Section II.I).

Each Permittee shall, no later than February 1, 2005, implement numerical criteria for peak flow control.

A Permittee or group of Permittees may substitute for the countywide peak flow control criteria with a Hydromodification Control Plan (HCP), on approval by the Regional Board, in the following circumstances:

(1) Stream or watershed-specific conditions indicate the need for a different peak flow control criteria, and the alternative numerical criteria is developed through the application of hydrologic modeling and supporting field observations; or

(2) A watershed-wide plan has been developed for implementation of control measures to reduce erosion and stabilize drainage systems on a watershed basis.

2. Standard Urban Storm Water Mitigation Plans (SUSMPs)

a) Each Permittee shall amend codes and ordinances not later than August 1, 2002 to give legal effect to SUSMP changes contained in this Order. Changes to SUSMP requirements shall take effect not later than September 2, 2002.

b) Each Permittee shall require that a single-family hillside home:

(1) Conserve natural areas;

(2) Protect slopes and channels;

(3) Provide storm drain system stenciling and signage;

(4) Divert roof runoff to vegetated areas before discharge unless the diversion would result in slope instability; and

(5) Direct surface flow to vegetated areas before discharge unless the diversion would result in slope instability.

c) Each Permittee shall require that a SUSMP as approved by the Regional Board in Board Resolution No. R 00-02 be implemented for the following categories of developments:

(1) Ten or more unit homes (includes single family homes, multifamily homes, condominiums, and apartments);

(2) A 100,000 or more square feet of impervious surface area industrial/commercial development;

(3) Automotive service facilities (SIC 5013, 5014, 5541, 7532-7534, and 7536-7539);

(4) Retail gasoline outlets;

(5) Restaurants (SIC 5812);

(6) Parking lots 5,000 square feet or more of surface area or with 25 or more parking spaces; and

(7) Redevelopment projects in subject categories that meet Redevelopment thresholds.

d) Each Permittee shall submit an ESA Delineation Map for its jurisdictional boundary, based on the Regional Board's ESA Definition, no later than June 3, 2002, for approval by the Regional Board Executive Officer in consultation with the California Department of Fish and Game, and the California Coastal Commission.

e) Each Permittee shall require the implementation of SUSMP provisions no later than September 2, 2002, for all projects located in or directly adjacent to or discharging directly to an ESA, where the development will:

(1) Discharge storm water and urban runoff that is likely to impact a sensitive biological species or habitat; and

(2) Create 2,500 square feet or more of impervious surface area.

3. Numerical Design Criteria

The Permittees shall require that post-construction Treatment Control BMPs incorporate, at a minimum, either a volumetric or flow based treatment control design standard, or both, as identified below to mitigate (infiltrate, filter or treat) storm water runoff:

a) Volumetric Treatment Control BMP

(1) The 85th percentile 24-hour runoff event determined as the maximized

capture storm water volume for the area, from the formula recommended in *Urban Runoff Quality Management, WEF Manual of Practice No. 23/ASCE Manual of Practice No. 87, (1998)*; or

(2) The volume of annual runoff based on unit basin storage water quality volume, to achieve 80 percent or more volume treatment by the method recommended in *California Stormwater Best Management Practices Handbook – Industrial/Commercial, (1993)*; or

(3) The volume of runoff produced from a 0.75 inch storm event, prior to its discharge to a storm water conveyance system; or

(4) The volume of runoff produced from a historical-record based reference 24-hour rainfall criterion for "treatment" (0.75 inch average for the Los Angeles County area) that achieves approximately the same reduction in pollutant loads achieved by the 85th percentile 24-hour runoff event.

b) Flow Based Treatment Control BMP

(1) The flow of runoff produced from a rain event equal to at least 0.2 inches per hour intensity; or

(2) The flow of runoff produced from a rain event equal to at least two times the

85th percentile hourly rainfall intensity for Los Angeles County; or

(3) The flow of runoff produced from a rain event that will result in treatment of the same portion of runoff as treated using volumetric standards above.

4. Applicability of Numerical Design Criteria

The Permittees shall require the following categories of Planning Priority Projects to design and implement post-construction treatment controls to mitigate storm water pollution:

a) Single-family hillside residential developments of one acre or more of surface area;

b) Housing developments (includes single family homes, multifamily homes, condominiums, and apartments) of ten units or more;

c) A 100,000 square feet or more impervious surface area industrial/commercial development;

d) Automotive service facilities (SIC 5013, 5014, 5541, 7532-7534 and 7536-7539) [5,000 square feet or more of surface area];

e) Retail gasoline outlets [5,000 square feet or more of impervious surface area and with projected Average Daily Traffic (ADT) of 100 or more vehicles]. Subsurface Treatment Control BMPs which

may endanger public safety (i.e., create an explosive environment) are considered not appropriate;

f) Restaurants (SIC 5812) [5,000 square feet or more of surface area];

g) Parking lots 5,000 square feet or more of surface area or with 25 or more parking spaces;

h) Projects located in, adjacent to or discharging directly to an ESA that meet threshold conditions identified above in 2.e; and

i) Redevelopment projects in subject categories that meet Redevelopment thresholds.

5. Not later than March 10, 2003, each Permittee shall require the implementation of SUSMP and post-construction control requirements for the industrial/commercial development category to projects that disturb one acre or more of surface area.

6. Site Specific Mitigation

Each Permittee shall, no later than September 2, 2002, require the implementation of a site-specific plan to mitigate post-development storm water for new development and redevelopment not requiring a SUSMP but which may potentially have adverse impacts on post-development storm water quality, where one or more of the following project characteristics exist:

a) Vehicle or equipment fueling areas;

b) Vehicle or equipment maintenance areas, including washing and repair;

c) Commercial or industrial waste handling or storage;

d) Outdoor handling or storage of hazardous materials;

e) Outdoor manufacturing areas;

f) Outdoor food handling or processing;

g) Outdoor animal care, confinement, or slaughter; or

h) Outdoor horticulture activities.

7. Redevelopment Projects

The Permittees shall apply the SUSMP, or site specific requirements including post-construction storm water mitigation to all Planning Priority Projects that undergo significant Redevelopment in their respective categories.

a) Significant Redevelopment means land-disturbing activity that results in the creation or addition or replacement of 5,000 square feet or more of impervious surface area on an already developed site.

Where Redevelopment results in an alteration to more than fifty percent of impervious surfaces of a previously existing

development, and the existing development was not subject to post development storm water quality control requirements, the entire project must be mitigated. Where Redevelopment results in an alteration to less than fifty percent of impervious surfaces of a previously existing development, and the existing development was not subject to post development storm water quality control requirements, only the alteration must be mitigated, and not the entire development.

b) Redevelopment does not include routine maintenance activities that are conducted to maintain original line and grade, hydraulic capacity, original purpose of facility or emergency redevelopment activity required to protect public health and safety.

c) Existing single family structures are exempt from the Redevelopment requirements.

8. Maintenance Agreement and Transfer

Each Permittee shall require that all developments subject to SUSMP and site specific plan requirements provide verification of maintenance provisions for Structural and Treatment Control BMPs, including but not limited to legal agreements, covenants, CEQA mitigation requirements, and or conditional use permits. Verification at a minimum shall include:

a) The developer's signed statement accepting responsibility for maintenance until the responsibility is legally transferred; and either

b) A signed statement from the public entity assuming responsibility for Structural or Treatment Control BMP maintenance and that it meets all local agency design standards; or

c) Written conditions in the sales or lease agreement, which requires the recipient to assume responsibility for maintenance and conduct a maintenance inspection at least once a year; or

d) Written text in project conditions, covenants and restrictions (CCRs) for residential properties assigning maintenance responsibilities to the Home Owners Association for maintenance of the Structural and Treatment Control BMPs; or

e) Any other legally enforceable agreement that assigns responsibility for the maintenance of post-construction Structural or Treatment Control BMPs.

9. Regional Storm Water Mitigation Program

A Permittee or Permittee group may apply to the Regional Board for approval of a regional or sub-regional storm water mitigation program to substitute in part or wholly SUSMP requirements. Upon review and a determination by the Regional Board Executive Officer that the proposal is technically valid and

appropriate, the Regional Board may consider for approval such a program if its implementation will:

a) Result in equivalent or improved storm water quality;

b) Protect stream habitat;

c) Promote cooperative problem solving by diverse interests;

d) Be fiscally sustainable and has secure funding; and

e) Be completed in five years including the construction and start-up of treatment facilities.

Nothing in this provision shall be construed as to delay the implementation of SUSMP requirements, as approved in this Order.

10. Mitigation Funding

The Permittees may propose a management framework, for endorsement by the Regional Board Executive Officer, to support regional or sub-regional solutions to storm water pollution, where any of the following situations occur:

a) A waiver for impracticability is granted;

b) Legislative funds become available;

c) Off-site mitigation is required because of loss of environmental habitat; or

d) An approved watershed management plan or a regional storm water mitigation plan exists that incorporates an equivalent or improved strategy for storm water mitigation.

11. California Environmental Quality Act (CEQA) Document Update

Each Permittee shall incorporate into its CEQA process, with immediate effect, procedures for considering potential storm water quality impacts and providing for appropriate mitigation when preparing and reviewing CEQA documents. The procedures shall require consideration of the following:

a) Potential impact of project construction on storm water runoff;

b) Potential impact of project post-construction activity on storm water runoff;

c) Potential for discharge of storm water from areas from material storage, vehicle or equipment fueling, vehicle or equipment maintenance (including washing), waste handling, hazardous materials handling or storage, delivery areas or loading docks, or other outdoor work areas;

d) Potential for discharge of storm water to impair the beneficial uses of the receiving waters or areas that provide water quality benefit;

e) Potential for the discharge of storm water to cause significant harm on the biological integrity of the waterways and water bodies;

f) Potential for significant changes in the flow velocity or volume of storm water runoff that can cause environmental harm; and

g) Potential for significant increases in erosion of the project site or surrounding areas.

12. General Plan Update

a) Each Permittee shall amend, revise or update its General Plan to include watershed and storm water quality and quantity management considerations and policies when any of the following General Plan elements are updated or amended: (i) Land Use, (ii) Housing, (iii) Conservation, and (iv) Open Space.

b) Each Permittee shall provide the Regional Board with the draft amendment or revision when a listed General Plan element or the General Plan is noticed for comment in accordance with Cal. Govt. Code § 65350 *et seq.*

13. Targeted Employee Training

Each Permittee shall train its employees in targeted positions (whose jobs or activities are engaged in development planning) regarding the development planning requirements

on an annual basis beginning no later than August 1, 2002, and more frequently if necessary. For Permittees with a population of 250,000 or more (2000 U.S. Census), training shall be completed no later than February 3, 2003.

14. Developer Technical Guidance and Information

    a) Each Permittee shall develop and make available to the developer community SUSMP (development planning) guidelines immediately.

    b) The Principal Permittee in partnership with Permittees shall issue no later than February 2, 2004, a technical manual for the siting and design of BMPs for the development community in Los Angeles County. The technical manual may be adapted from the revised California Storm Water Quality Task Force Best Management Practices Handbooks scheduled for publication in September 2002. The technical manual shall at a minimum include:

        (1) Treatment Control BMPs based on flow-based and volumetric water quality design criteria for the purposes of countywide consistency;

        (2) Peak Flow Control criteria to control peak discharge rates, velocities and duration;

(3) Expected pollutant removal performance ranges obtained from national databases, technical reports and the scientific literature;

(4) Maintenance considerations; and

(5) Cost considerations.

E. Development Construction Program

1. Each Permittee shall implement a program to control runoff from construction activity at all construction sites within its jurisdiction. The program shall ensure the following minimum requirements are effectively implemented at all construction sites:

   a) Sediments generated on the project site shall be retained using adequate Treatment Control or Structural BMPs;

   b) Construction-related materials, wastes, spills, or residues shall be retained at the project site to avoid discharge to streets, drainage facilities, receiving waters, or adjacent properties by wind or runoff;

   c) Non-storm water runoff from equipment and vehicle washing and any other activity shall be contained at the project site; and

   d) Erosion from slopes and channels shall be controlled by implementing an effective combination of BMPs (as approved

in Regional Board Resolution No. 99-03), such as the limiting of grading scheduled during the wet season; inspecting graded areas during rain events; planting and maintenance of vegetation on slopes; and covering erosion susceptible slopes.

2. For construction sites one acre and greater, each Permittee shall comply with all conditions in section E.1. above and shall:

   a) Require the preparation and submittal of a Local Storm Water Pollution Prevention Plan (Local SWPPP), for approval prior to issuance of a grading permit for construction projects.

      The Local SWPPP shall include appropriate construction site BMPs and maintenance schedules. (A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP). The Local SWPPP must include the rationale used for selecting or rejecting BMPs. The project architect, or engineer of record, or authorized qualified designee, must sign a statement on the Local SWPPP to the effect:

      "*As the architect/engineer of record, I have selected appropriate BMPs to effectively minimize the negative impacts of this project's construction activities on storm water quality. The project owner and contractor are aware that the selected*

BMPs must be installed, monitored, and maintained to ensure their effectiveness. The BMPs not selected for implementation are redundant or deemed not applicable to the proposed construction activity."

The landowner or the landowner's agent shall sign a statement to the effect:

"I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that submitting false and/or inaccurate information, failing to update the Local SWPPP to reflect current conditions, or failing to properly and/or adequately implement the Local SWPPP may result in revocation of grading and/or other permits or other sanctions provided by law."

The Local SWPPP certification shall be signed by the landowner as follows, for a corporation: by a responsible corporate officer which means (a) a president, secretary, treasurer, or vice president of the corporation in charge of a principal

business function, or any other person who performs similar policy or decision-making functions for the corporation, or (b) the manager of the construction activity if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures; for a partnership or sole proprietorship: by a general partner or the proprietor; or for a municipality or other public agency: by an elected official, a ranking management official (e.g., County Administrative Officer, City Manager, Director of Public Works, City Engineer, District Manager), or the manager of the construction activity if authority to sign Local SWPPPs has been assigned or delegated to the manager in accordance with established agency policy.

b) Inspect all construction sites for storm water quality requirements during routine inspections a minimum of once during the wet season. The Local SWPPP shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within 2 weeks. If compliance has not been attained, the Permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide

general construction storm water permit, each Permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.

c) Require, no later than March 10, 2003, prior to issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction storm water permit, proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for permit coverage and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at least as inclusive in controls and BMPs as the State SWPPP.

3. For sites five acres and greater, each Permittee shall comply with all conditions in Sections E.1. and E.2. and shall:

a) Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for coverage under the GCASP and a certification that a SWPPP has been prepared by the project developer. A Local SWPPP may substitute for the State SWPPP if the Local SWPPP is at

least as inclusive in controls and BMPs as the State SWPPP.

b) Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.

c) Use an effective system to track grading permits issued by each Permittee. To satisfy this requirement, the use of a database or GIS system is encouraged, but not required.

4. GCASP Violation Referrals

a) Referral of Violations of the SQMP, Regional Board Resolution 98-08, and municipal storm water ordinances:

A Permittee may refer a violation(s) to the Regional Board provided that the Permittee has made a good faith effort of progressive enforcement. At a minimum, a Permittee's good faith effort must include documentation of:

- Two follow-up inspections within 3 months, and
- Two warning letters or notices of violation.

b) Referral of Violations of GCASP Filing Requirements:

For those projects subject to the GCASP, Permittees shall refer non-filers (i.e., those projects which cannot demonstrate that they have a WDID number) to the Regional Board, within 15 days of making a determination. In making such referrals, Permittees shall include, at a minimum, the following documentation:

- Project location;
- Developer;
- Estimated project size; and
- Records of communication with the developer regarding filing requirements.

5. Each Permittee shall train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the storm water management program no later than August 1, 2002, and annually thereafter. For Permittees with a population of 250,000 or more (2000 U.S. Census), initial training shall be completed no later than February 3, 2003. Each Permittee shall maintain a list of trained employees.

F. Public Agency Activities Program

Each Permittee shall implement a Public Agency program to minimize storm water pollution impacts from public agency activities. Public Agency requirements consist of:

- Sewage Systems Maintenance, Overflow, and Spill Prevention
- Public Construction Activities Management
- Vehicle Maintenance/Material Storage Facilities/Corporation Yards Management
- Landscape and Recreational Facilities Management
- Storm Drain Operation and Management
- Streets and Roads Maintenance
- Parking Facilities Management
- Public Industrial Activities Management
- Emergency Procedures
- Treatment Feasibility Study

1. Sewage System Maintenance, Overflow, and Spill Prevention

   a) Each Permittee shall implement a response plan for overflows of the sanitary sewer system within their respective jurisdiction, which shall consist at a minimum of the following:

      (1) Investigation of any complaints received;

      (2) Upon notification, immediate response to overflows for containment; and

      (3) Notification to appropriate sewer and public health agencies when a sewer overflows to the MS4.

b) In addition to 1.a.1, 1.a.2, and 1.a.3 above, for those Permittees, which own and/or operate a sanitary sewer system, the Permittee shall also implement the following requirements:

(1) Procedures to prevent sewage spills or leaks from sewage facilities from entering the MS4; and

(2) Identify, repair, and remediate sanitary sewer blockages, exfiltration, overflow, and wet weather overflows from sanitary sewers to the MS4.

2. Public Construction Activities Management

a) Each Permittee shall implement the Development Planning Program requirements (Permit Part 4.D) at public construction projects.

b) Each Permittee shall implement the Development Construction Program requirements (Permit Part 4.E) at Permittee owned construction sites.

c) Each Permittee shall obtain coverage under the GCASP for public construction sites 5 acres or greater (or part of a larger area of development) except that a municipality under 100,000 in population (1990 U.S. Census) need not obtain coverage under a separate permit until March 10, 2003.

d) Each Permittee, no later than March 10, 2003, shall obtain coverage under a statewide general construction storm water permit for

public construction sites for projects between one and five acres.

3. Vehicle Maintenance/Material Storage Facilities/ Corporation Yards Management

   a) Each Permittee, consistent with the SQMP, shall implement SWPPPs for public vehicle maintenance facilities, material storage facilities, and corporation yards which have the potential to discharge pollutants into storm water.

   b) Each Permittee shall implement BMPs to minimize pollutant discharges in storm water including but not be limited to:

      (1) Good housekeeping practices;

      (2) Material storage control;

      (3) Vehicle leaks and spill control; and

      (4) Illicit discharge control.

   c) Each Permittee shall implement the following measures to prevent the discharge of pollutants to the MS4:

      (1) For existing facilities, that are not already plumbed to the sanitary sewer, all vehicle and equipment wash areas (except for fire stations) shall either be:

         (i) Self-contained;

         (ii) Equipped with a clarifier;

         (iii) Equipped with an alternative pretreatment device; or

(iv) Plumbed to the sanitary sewer.

(2) For new facilities, or during redevelopment of existing facilities (including fire stations), all vehicle and equipment wash areas shall be plumbed to the sanitary sewer and be equipped with a pretreatment device in accordance with requirements of the sewer agency.

4. Landscape and Recreational Facilities Management

Each Permittee shall implement the following requirements:

a) A standardized protocol for the routine and non-routine application of pesticides, herbicides (including pre-emergents), and fertilizers;

b) Consistency with State Board's guidelines and monitoring requirements for application of aquatic pesticides to surface waters (WQ Order No. 2001-12 DWQ);

c) Ensure no application of pesticides or fertilizers immediately before, during, or immediately after a rain event or when water is flowing off the area to be applied;

d) Ensure that no banned or unregistered pesticides are stored or applied;

e) Ensure that staff applying pesticides are certified by the California Department of Food and Agriculture, or are under the direct supervision of a certified pesticide applicator;

f) Implement procedures to encourage retention and planting of native vegetation and to reduce water, fertilizer, and pesticide needs;

g) Store fertilizers and pesticides indoors or under cover on paved surfaces or use secondary containment;

h) Reduce the use, storage, and handling of hazardous materials to reduce the potential for spills; and

i) Regularly inspect storage areas.

5. Storm Drain Operation and Management

a) Each Permittee shall designate catch basin inlets within its jurisdiction as one of the following:

Priority A: Catch basins that are designated as consistently generating the highest volumes of trash and/or debris.

Priority B: Catch basins that are designated as consistently generating moderate volumes of trash and/or debris.

Priority C: Catch basins that are designated as generating low volumes of trash and/or debris.

b) Permittees subject to a trash TMDL (Los Angeles River and Ballona Creek WMAs) shall continue to implement the requirements listed below until trash TMDL implementation measures are adopted. Thereafter,

the subject Permittees shall implement programs in conformance with the TMDL implementation schedule, which shall include an effective combination of measures such as street sweeping, catch basin cleaning, installation of treatment devices and trash receptacles, or other BMPs. Default requirements include:

(1) Inspection and cleaning of catch basins between May 1 and September 30 of each year;

(2) Additional cleaning of any catch basin that is at least 40% full of trash and/or debris;

(3) Record keeping of catch basins cleaned; and

(4) Recording of the overall quantity of catch basin waste collected.

If the implementation phase for the Los Angeles River and Ballona Creek Trash TMDLs has not begun by October 2003, subject Permittees shall implement the requirements described below in subsection 5(c), until such time programs in conformance with the subject Trash TMDLs are being implemented.

c) Permittees not subject to a trash TMDL shall:

(1) Clean catch basins according to the following schedule:

Priority A: A minimum of three times during the wet season and once during the dry season every year.

Priority B: A minimum of once during the wet season and once during the dry season every year.

Priority C: A minimum of once per year.

In addition to the schedule above, between February 1, 2002 and July 1, 2003, Permittees shall ensure that any catch basin that is at least 40% full of trash and/or debris shall be cleaned out. After July 1, 2003, Permittees shall ensure that any catch basin that is at least 25% full of trash and debris shall be cleaned out.

(2) For any special event that can be reasonably expected to generate substantial quantities of trash and litter, include provisions that require for the proper management of trash and litter generated, as a condition of the special use permit issued for that event. At a minimum, the municipality who issues the permit for the special event shall arrange for either temporary screens to be placed on catch basins or for catch basins in that area to be cleaned out subsequent to the event and prior to any rain event.

(3) Place trash receptacles at all transit stops within its jurisdiction that have shelters no later than August 1, 2002, and at all other transit stops within its jurisdiction no later than February 3, 2003. All trash receptacles shall be maintained as necessary.

d) Each Permittee shall inspect the legibility of the catch basin stencil or label nearest the inlet. Catch basins with illegible stencils shall be recorded and re-stenciled or re-labeled within 180 days of inspection.

e) Each Permittee shall implement BMPs for Storm Drain Maintenance that include:

(1) A program to visually monitor Permittee-owned open channels and other drainage structures for debris at least annually and identify and prioritize problem areas of illicit discharge for regular inspection;

(2) A review of current maintenance activities to assure that appropriate storm water BMPs are being utilized to protect water quality;

(3) Removal of trash and debris from open channel storm drains shall occur a minimum of once per year before the storm season;

(4) Minimize the discharge of contaminants during MS4 maintenance and clean outs; and

(5) Proper disposal of material removed.

6. Streets and Roads Maintenance

a) Each Permittee shall designate streets and/or street segments within its jurisdiction as one of the following:

Priority A: Streets and/or street segments that are designated as consistently generating the highest volumes of trash and/or debris.

Priority B: Streets and/or street segments that are designated as consistently generating moderate volumes of trash and/or debris.

Priority C: Streets and/or street segments that are designated as generating low volumes of trash and/or debris.

b) Each Permittee shall perform street sweeping of curbed streets according to the following schedule:

Priority A: These streets and/or street segments shall be swept at least two times per month.

Priority B: Each Permittee shall ensure that each street and/or street segments is swept at least once per month.

Priority C: These streets and/or street segments shall be swept as necessary but in no case less than once per year.

c) Each Permittee shall require that:

(1) Sawcutting wastes be recovered and disposed of properly and that in no case shall waste be left on a roadway or allowed to enter the storm drain;

(2) Concrete and other street and road maintenance materials and wastes shall be managed to prevent discharge to the MS4; and

(3) The washout of concrete trucks and chutes shall only occur in designated areas and never discharged to storm drains, open ditches, streets, or catch basins.

d) Each Permittee shall, no later than August 1, 2002, train their employees in targeted positions (whose interactions, jobs, and activities affect storm water quality) regarding the requirements of the storm water management program to:

(1) Promote a clear understanding of the potential for maintenance activities to pollute storm water; and

(2) Identify and select appropriate BMPs.

For Permittees with a population of 250,000 or more (2000 U.S. Census) training shall be completed no later than February 1, 2003.

7. Parking Facilities Management

Permittee-owned parking lots exposed to storm water shall be kept clear of debris and excessive oil buildup and cleaned no less than 2 times per

month and/or inspected no less than 2 times per month to determine if cleaning is necessary. In no case shall a Permittee-owned parking lot be cleaned less than once a month.

8. Public Industrial Activities Management

Each Permittee shall, for any municipal activity considered a discharge of storm water associated with industrial activity, obtain separate coverage under the GIASP except that a municipality under 100,000 in population (1990 U.S. Census) need not file the Notice Of Intent to be covered by said permit until March 10, 2003 (with the exception of power plants, airports, and uncontrolled sanitary landfills).

9. Emergency Procedures

Each Permittee shall repair essential public services and infrastructure in a manner to minimize environmental damage in emergency situations such as: earthquakes; fires; floods; landslides; or windstorms. BMPs shall be implemented to the extent that measures do not compromise public health and safety. After initial emergency response or emergency repair activities have been completed, each Permittee shall implement BMPs and programs as required under this Order.

10. Treatment Feasibility Study

The Permittees in cooperation with the County Sanitation Districts of Los Angeles County shall conduct a study to investigate the possible diversion of dry weather discharges or the use of alternative Treatment Control BMPs to treat flows

from their jurisdiction which may impact public health and safety and/or the environment. The Permittees shall collectively review their individual prioritized lists and create a watershed based priority list of drains for potential diversion or treatment and submit the priority listing to the Regional Board Executive Officer, no later than July 1, 2003.

G. Illicit Connections and Illicit Discharges Elimination Program

Permittees shall eliminate all illicit connections and illicit discharges to the storm drain system, and shall document, track, and report all such cases in accordance with the elements and performance measures specified in the following subsections.

1. General

    a) Implementation: Each Permittee must develop an Implementation Program which specifies how each Permittee is implementing revisions to the IC/ID Program of the SQMP. This Implementation Program must be documented, and available for review and approval by the Regional Board Executive Officer, upon request.

    b) Tracking: All Permittees shall, no later than February 3, 2003, develop and maintain a listing of all permitted connections to their storm drain system. All Permittees shall map at a scale and in a format specified by the Principal Permittee all

illicit connections and discharges on their baseline maps, and shall transmit this information to the Principal Permittee. No later than February 3, 2003, the Principal Permittee shall use this information as well as results of baseline and priority screening for illicit connections (as set forth in subsection 2 below) to start an annual evaluation of patterns and trends of illicit connections and illicit discharges, with the objectives of identifying priority areas for elimination of illicit connections and illicit discharges.

c) Training: All Permittees shall train all targeted employees who are responsible for identification, investigation, termination, cleanup, and reporting of illicit connections and discharges. For Permittees with a population of less than 250,000 (2000 U.S. Census), training shall be completed no later than August 1, 2002. For Permittees with a population of 250,000 or more (2000 U.S. Census), training shall be completed no later than February 3, 2003. Furthermore, all Permittees shall conduct refresher training on an annual basis thereafter.

2. Illicit Connections

a) Screening for Illicit Connections

(1) Field Screening: All Permittees shall field Screen the storm drain system for illicit connections in accordance with the following schedule:

(i) Open channels: No later than February 3, 2003;

(ii) Underground pipes in priority areas: No later than February 1, 2005; and

(iii) Underground pipes with a diameter of 36 inches or greater: No later than December 12, 2006.

Permittees shall report, to the Principal Permittee, on the location and length of open channels or underground pipes that have been Screened *vis a vis* the entire storm drain network, and on the status of suspected, confirmed, and terminated illicit connections. Permittees shall maintain a list containing all permitted connections and the status of connections under investigation for possible illicit connection.

(2) Permit Screening: No later than December 12, 2006, Permittees shall complete a review of all permitted connections to the storm drain system, to confirm compliance with Part 1 (Discharge Prohibition).

b) Response to Illicit Connections

(1) Investigation: Upon discovery or upon receiving a report of a suspected illicit connection, Permittees shall initiate an investigation within 21 days, to determine the source of the connection, the nature and volume of discharge through

the connection, and the responsible party for the connection.

(2) Termination: Upon confirmation of the illicit nature of a storm drain connection, Permittees shall ensure termination of the connection within 180 days, using enforcement authority as needed.

3. Illicit Discharges

a) Abatement and Cleanup: Permittees shall respond, within one business day of discovery or a report of a suspected illicit discharge, with activities to abate, contain, and clean up all illicit discharges, including hazardous substances.

b) Investigation: Permittees shall investigate illicit discharges as soon as practicable (during or immediately following containment and cleanup activities), and shall take enforcement action as appropriate.

Part 5. DEFINITIONS

The following are definitions for terms applicable to this Order:

"Adverse Impact" means a detrimental effect upon water quality or beneficial uses caused by a discharge or loading of a pollutant or pollutants.

"Anti-degradation policies" means the *Statement of Policy with Respect to Maintaining High Quality*

Water in California (State Board Resolution No. 68-16) which protects surface and ground waters from degradation. In particular, this policy protects waterbodies where existing quality is higher than that necessary for the protection of beneficial uses including the protection of fish and wildlife propagation and recreation on and in the water.

"Applicable Standards and Limitations" means all State, interstate, and federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including "effluent limitations, "water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403 and 404 of CWA.

"Areas of Special Biological Significance (ASBS)" means all those areas of this state as ASBS, listed specifically within the California Ocean Plan or so designated by the State Board which, among other areas, includes the area from Mugu Lagoon to Latigo Point: Oceanwater within a line originating from Laguna Point at 34° 5' 40" north, 119° 6'30" west, thence southeasterly following the mean high tideline to a point at Latigo Point defined by the intersection of the meanhigh tide line and a line extending due south of Benchmark 24; thence due south to a distance of 1000 feet offshore or to the 100 foot isobath, whichever distance is greater; thence northwesterly following the 100 foot isobath or maintaining a 1,000-foot distance from shore, whichever maintains the

greater distance from shore, to a point lying due south of Laguna Point, thence due north to Laguna Point.

"Authorized Discharge" means any discharge that is authorized pursuant to an NPDES permit or meets the conditions set forth in this Order.

"Automotive Service Facilities" means a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 5511, 7532-7534, or 7536-7539. For inspection purposes, Permittees need not inspect facilities with SIC codes 5013, 5014, 5541, 5511, provided that these facilities have no outside activities or materials that may be exposed to storm water.

"Basin Plan" means the Water Quality Control Plan, Los Angeles Region, Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties, adopted by the Regional Board on June 13, 1994 and subsequent amendments.

"Beneficial Uses" means the existing or potential uses of receiving waters in the permit area as designated by the Regional Board in the Basin Plan.

"Best Management Practices (BMPs)" means methods, measures, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and nonpoint source discharges including storm water. BMPs include structural and nonstructural controls, and operation and

maintenance procedures, which can be applied before, during, and/or after pollution producing activities.

"Commercial Development" means any development on private land that is not heavy industrial or residential. The category includes, but is not limited to: hospitals, laboratories and other medical facilities, educational institutions, recreational facilities, plant nurseries, car wash facilities, mini-malls and other business complexes, shopping malls, hotels, office buildings, public warehouses and other light industrial complexes.

"Construction" means constructing, clearing, grading, or excavation that results in soil disturbance. Construction includes structure teardown. It does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of facility; emergency construction activities required to immediately protect public health and safety; interior remodeling with no outside exposure of construction material or construction waste to storm water; mechanical permit work; or sign permit work.

"Control" means to minimize, reduce, eliminate, or prohibit by technological, legal, contractual or other means, the discharge of pollutants from an activity or activities.

"Dechlorinated/Debrominated Swimming Pool Discharge" means swimming pool discharges which have no measurable chlorine or bromine and do not contain any detergents, wastes, or additional chemicals not typically found in swimming pool

water. The term does not include swimming pool filter backwash.

"Development" means any construction, rehabilitation, redevelopment or reconstruction of any public or private residential project (whether single-family, multi-unit or planned unit development); industrial, commercial, retail and other non-residential projects, including public agency projects; or mass grading for future construction. It does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of facility, nor does it include emergency construction activities required to immediately protect public health and safety.

"Directly Adjacent" means situated within 200 feet of the contiguous zone required for the continued maintenance, function, and structural stability of the environmentally sensitive area.

"Director" means the Director of a municipality and Person(s) designated by and under the Director's instruction and supervision.

"Discharge" means when used without qualification the "discharge of a pollutant."

"Discharging Directly" means outflow from a drainage conveyance system that is composed entirely or predominantly of flows from the subject, property, development, subdivision, or industrial facility, and not commingled with the flows from adjacent lands.

"Discharge of a Pollutant" means: any addition of any "pollutant" or combination of pollutants to

"waters of the United States" from any "point source" or, any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. The term discharge includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

"Disturbed Area" means an area that is altered as a result of clearing, grading, and/or excavation.

"Dry Weather" means those days with less than 0.1 inch of rainfall, and occurring more than three days after a Rain Day.

"Environmentally Sensitive Areas (ESAs)" means an area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which would be easily disturbed or degraded by human activities and developments (California Public Resources Code § 30107.5). Areas subject to storm water mitigation requirements are: areas designated as Significant Ecological Areas by the County of Los Angeles (*Los Angeles County Significant Areas Study, Los Angeles County Department of Regional Planning (1976)* and amendments); an area designated as a

Significant Natural Area by the California Department of Fish and Game's Significant Natural Areas Program, provided that area has been field verified by the Department of Fish and Game; an area listed in the Basin Plan as supporting the "Rare, Threatened, or Endangered Species (RARE)" beneficial use; and an area identified by a Permittee as environmentally sensitive.

"General Construction Activities Storm Water Permit (GCASP)" means the general NPDES permit adopted by the State Board which authorizes the discharge of storm water from construction activities under certain conditions.

"General Industrial Activities Storm Water Permit (GIASP)" means the general NPDES permit adopted by the State Board which authorizes the discharge of storm water from certain industrial activities under certain conditions.

"Hillside" means property located in an area with known erosive soil conditions, where the development contemplates grading on any natural slope that is 25% or greater and where grading contemplates cut or fill slopes.

"Illicit Connection" means any man-made conveyance that is connected to the storm drain system without a permit, excluding roof drains and other similar type connections. Examples include channels, pipelines, conduits, inlets, or outlets that are connected directly to the storm drain system.

"Illicit Discharge" means any discharge to the storm drain system that is prohibited under local, state, or federal statutes, ordinances, codes, or regulations. The term illicit discharge includes all non storm-water discharges except discharges pursuant to an NPDES permit, discharges that are identified in Part 1, "Discharge Prohibitions" of this order, and discharges authorized by the Regional Board Executive Officer.

"Illicit Disposal" means any disposal, either intentionally or unintentionally, of material(s) or waste(s) that can pollute storm water.

"Industrial/Commercial Facility" means any facility involved and/or used in the production, manufacture, storage, transportation, distribution, exchange or sale of goods and/or commodities, and any facility involved and/or used in providing professional and non-professional services. This category of facilities includes, but is not limited to, any facility defined by the Standard Industrial Classifications (SIC). Facility ownership (federal, state, municipal, private) and profit motive of the facility are not factors in this definition.

"Infiltration" means the downward entry of water into the surface of the soil.

"Inspection" means entry and the conduct of an on-site review of a facility and its operations, at reasonable times, to determine compliance with specific municipal or other legal requirements. The steps involved in performing an inspection, include, but are not limited to:

1. Pre-inspection documentation research;
2. Request for entry;
3. Interview of facility personnel;
4. Facility walk-through.
5. Visual observation of the condition of facility premises;
6. Examination and copying of records as required;
7. Sample collection (if necessary or required);
8. Exit conference (to discuss preliminary evaluation); and,
9. Report preparation, and if appropriate, recommendations for coming into compliance.

In the case of restaurants, a Permittee may conduct an inspection from the curbside, provided that such "curbside" inspection provides the Permittee with adequate information to determine an operator's compliance with BMPs that must be implemented per requirements of this Order, Regional Board Resolution 98-08, County and municipal ordinances, and the SQMP.

"Large Municipal Separate Storm Sewer System (MS4)" means all MS4s that serve a population greater than 250,000 (1990 Census) as defined in 40 CFR 122.26 (b)(4). The Regional Board designated Los Angeles County as a large MS4 in 1990, based on: (i) the U.S. Census Bureau 1990 population count of 8.9 million, and (ii) the interconnectivity of the MS4s

in the incorporated and unincorporated areas within the County.

"Local SWPPP" means the Storm Water Pollution Prevention Plan required by the local agency for a project that disturbs one or more acres of land.

"Maximum Extent Practicable (MEP)" means the standard for implementation of storm water management programs to reduce pollutants in storm water. CWA § 402(p)(3)(B)(iii) requires that municipal permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. See also State Board Order WQ 2000-11 at page 20.

"Method Detection Limit (MDL)" means the minimum concentration of a substance that can be measured and reported with 99 percent confidence that the analyte concentration is greater than zero, as defined in 40 CFR 136, Appendix B.

"Minimum Level (ML)" means the concentration at which the entire analytical system must give a recognizable signal and acceptable calibration point. The ML is the concentration in a sample that is equivalent to the concentration of the lowest calibration standard analyzed by a specific analytical procedure, assuming that all the method specified sample weights, volumes, and processing steps have been followed.

"Municipal Separate Storm Sewer System (MS4)" means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, alleys, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned by a State, city, county, town or other public body, that is designed or used for collecting or conveying storm water, which is not a combined sewer, and which is not part of a publicly owned treatment works, and which discharges to Waters of the United States.

"National Pollutant Discharge Elimination System (NPDES)" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under CWA §307, 402, 318, and 405. The term includes an "approved program."

"Natural Drainage Systems" means unlined or unimproved (not engineered) creeks, streams, rivers or similar waterways.

"New Development" means land disturbing activities; structural development, including construction or installation of a building or structure, creation of impervious surfaces; and land subdivision.

"Non-Storm Water Discharge" means any discharge to a storm drain that is not composed entirely of storm water.

"Nuisance" means anything that meets all of the following requirements: (1) is injurious to health, or is

indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.; (3) occurs during, or as a result of, the treatment or disposal of wastes.

"Parking Lot" means land area or facility for the parking or storage of motor vehicles used for businesses, commerce, industry, or personal use, with a lot size of 5,000 square feet or more of surface area, or with 25 or more parking spaces.

"Permittee(s)" means Co-Permittees and any agency named in this Order as being responsible for permit conditions within its jurisdiction. Permittees to this Order include the Los Angeles County Flood Control District, Los Angeles County, and the cities of Agoura Hills, Alhambra, Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bell Gardens, Beverly Hills, Bradbury, Burbank, Calabasas, Carson, Cerritos, Claremont, Commerce, Compton, Covina, Cudahy, Culver City, Diamond Bar, Downey, Duarte, El Monte, El Segundo, Gardena, Glendale, Glendora, Hawaiian Gardens, Hawthorne, Hermosa Beach, Hidden Hills, Huntington Park, Industry, Inglewood, Irwindale, La Canada Flintridge, La Habra Heights, Lakewood, La Mirada, La Puente, La Verne, Lawndale, Lomita, Los Angeles, Lynwood, Malibu, Manhattan Beach, Maywood, Monrovia, Montebello, Monterey Park, Norwalk, Palos Verdes Estates, Paramount, Pasadena, Pico

Rivera, Pomona, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Rosemead, San Dimas, San Fernando, San Gabriel, San Marino, Santa Clarita, Santa Fe Springs, Santa Monica, Sierra Madre, Signal Hill, South El Monte, South Gate, South Pasadena, Temple City, Torrance, Vernon, Walnut, West Covina, West Hollywood, Westlake Village, and Whittier.

"Planning Priority Projects" means those projects that are required to incorporate appropriate storm water mitigation measures into the design plan for their respective project. These types of projects include:

1. Ten or more unit homes (includes single family homes, multifamily homes, condominiums, and apartments)
2. A 100,000 or more square feet of impervious surface area industrial/commercial development (1 ac starting March 2003)
3. Automotive service facilities (SIC 5013, 5014, 5541, 7532-7534, and 7536-7539)
4. Retail gasoline outlets
5. Restaurants (SIC 5812)
6. Parking lots 5,000 square feet or more of surface area or with 25 or more parking spaces
7. Redevelopment projects in subject categories that meet Redevelopment thresholds

8. Projects located in or directly adjacent to or discharging directly to an ESA, which meet thresholds; and

9. Those projects that require the implementation of a site-specific plan to mitigate post-development storm water for new development not requiring a SUSMP but which may potentially have adverse impacts on post-development storm water quality, where the following project characteristics exist:

   a) Vehicle or equipment fueling areas;

   b) Vehicle or equipment maintenance areas, including washing and repair;

   c) Commercial or industrial waste handling or storage;

   d) Outdoor handling or storage of hazardous materials;

   e) Outdoor manufacturing areas;

   f) Outdoor food handling or processing;

   g) Outdoor animal care, confinement, or slaughter; or

   h) Outdoor horticulture activities.

"Pollutants" means those "pollutants" defined in CWA §502(6) (33.U.S.C.§1362(6)), and incorporated by reference into California Water Code §13373.

"Potable Water Distribution Systems Releases" means sources of flows from drinking water storage, supply and distribution systems including flows from

system failures, pressure releases, system maintenance, distribution line testing, fire hydrant flow testing; and flushing and dewatering of pipes, reservoirs, vaults, and minor non-invasive well maintenance activities not involving chemical addition(s). It does not include wastewater discharges from activities that occur at wellheads, such as well construction, well development (i.e., aquifer pumping tests, well purging, etc.), or major well maintenance.

"Project" means all development, redevelopment, and land disturbing activities. The term is not limited to "Project" as defined under CEQA (Pub. Resources Code §21065).

"Rain Days" are those days with greater than or equal to 0.1 inch of rainfall.

"Rain Event" means any rain event greater than 0.1 inch in 24 hours except where specifically stated otherwise.

"Rare, Threatened, or Endangered Species (RARE)" means a beneficial use for waterbodies in the Los Angeles Region, as designated in the Basin Plan (Table 2-1), that supports habitats necessary, at least in part, for the survival and successful maintenance of plant or animal species established under state or federal law as rare, threatened, or endangered.

"Receiving Waters" means all surface water bodies in the Los Angeles Region that are identified in the Basin Plan.

"Redevelopment" means land-disturbing activity that results in the creation, addition, or replacement of 5,000 square feet or more of impervious surface area on an already developed site. Redevelopment includes, but is not limited to: the expansion of a building footprint; addition or replacement of a structure; replacement of impervious surface area that is not part of a routine maintenance activity; and land disturbing activities related to structural or impervious surfaces. It does not include routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of facility, nor does it include emergency construction activities required to immediately protect public health and safety.

"Regional Administrator" means the Regional Administrator of the Regional Office of the USEPA or the authorized representative of the Regional Administrator.

"Restaurant" means a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC Code 5812).

"Retail Gasoline Outlet" means any facility engaged in selling gasoline and lubricating oils.

"Runoff" means any runoff including storm water and dry weather flows from a drainage area that reaches a receiving water body or subsurface. During dry weather it is typically comprised of base flow

either contaminated with pollutants or uncontaminated, and nuisance flows.

"Screening" means using proactive methods to identify illicit connections through a continuously narrowing process. The methods may include: performing baseline monitoring of open channels, conducting special investigations using a prioritization approach, analyzing maintenance records for catch basin and storm drain cleaning and operation, and verifying all permitted connections into the storm drains. Special investigation techniques may include: dye testing, visual inspection, smoke testing, flow monitoring, infrared, aerial and thermal photography, and remote control camera operation.

"Sidewalk Rinsing" means pressure washing of paved pedestrian walkways with average water usage of 0.006 gallons per square foot, with no cleaning agents, and properly disposing of all debris collected, as authorized under Regional Board Resolution No. 98-08.

"Significant Ecological Area (SEA)" means an area that is determined to possess an example of biotic resources that cumulatively represent biological diversity, for the purposes of protecting biotic diversity, as part of the Los Angeles County General Plan.[6]

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[6] The 61 existing SEAs represent the findings of a study that was completed in 1976 by England and Nelson, Environmental Consultants, as amended through the adoption of a revised Los Angeles County General Plan in 1980. The results of

(Continued on following page)

Areas are designated as SEAs, if they possess one or more of the following criteria:

1. The habitat of rare, endangered, and threatened plant and animal species.

2. Biotic communities, vegetative associations, and habitat of plant and animal species that are either one of a kind, or are restricted in distribution on a regional basis.

3. Biotic communities, vegetative associations, and habitat of plant and animal species that are either one of a kind or are restricted in distribution in Los Angeles County.

4. Habitat that at some point in the life cycle of a species or group of species, serves as a concentrated breeding, feeding, resting, migrating grounds and is limited in availability either regionally or within Los Angeles County.

5. Biotic resources that are of scientific interest because they are either an extreme in physical/geographical limitations, or represent an unusual variation in a population or community.

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an update study to evaluate existing SEAs within unincorporated Los Angeles County is currently being proposed to the Los Angeles County Planning Commission (*Los Angeles County Significant Ecological Area Update Study 2000, Background Report*, PCR Services Corporation). The *Update Study 2000*, which contains existing and proposed SEA boundaries, can be downloaded from the Los Angeles County Department of Planning website at http://planning.co.la.ca.us/drp_revw.html#SEA

6. Areas important as game species habitat or as fisheries.

7. Areas that would provide for the preservation of relatively undisturbed examples of natural biotic communities in Los Angeles County.

8. Special areas.[7]

"Significant Natural Area (SNA)" means an area defined by the California Department of Fish and Game (DFG), Significant Natural Areas Program, as an area that contains an important example of California's biological diversity. The most current SNA maps, reports, and descriptions can be downloaded from the DFG website at ftp://maphost.dfg.ca.gov/outgoing/whdab/sna/. These areas are identified using the following biological criteria only, irrespective of any administrative or jurisdictional considerations:

1. Areas supporting extremely rare species or habitats.

2. Areas supporting associations or concentrations of rare species or habitats.

3. Areas exhibiting the best examples of rare species and habitats in the state.

"Site" means the land or water area where any "facility or activity" is physically located or conducted,

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[7] These criteria from the 1976 study have been modified in the *Update Study 2000*.

including adjacent land used in connection with the facility or activity.

"Source Control BMP" means any schedules of activities, prohibitions of practices, maintenance procedures, managerial practices or operational practices that aim to prevent storm water pollution by reducing the potential for contamination at the source of pollution.

"SQMP" means the Los Angeles Countywide Stormwater Quality Management Program.

"State Storm Water Pollution Prevention Plan (State SWPPP)" means a plan, as required by a State General Permit, identifying potential pollutant sources and describing the design, placement and implementation of BMPs, to effectively prevent non-stormwater Discharges and reduce Pollutants in Stormwater Discharges during activities covered by the General Permit.

"Storm Water" means storm water runoff, snow melt runoff, and surface runoff and drainage.

"Storm Water Discharge Associated with Industrial Activity" means industrial discharge as defined in 40 CFR 122.26(b)(14)

"Stormwater Quality Management Program" means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with provisions of the

NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time.

"Structural BMP" means any structural facility designed and constructed to mitigate the adverse impacts of storm water and urban runoff pollution (e.g. canopy, structural enclosure). The category may include both Treatment Control BMPs and Source Control BMPs.

"Summer Dry Weather" means Dry Weather days occurring from April 1 through October 31 of each year.

"SUSMP" means the Los Angeles Countywide Standard Urban Stormwater Mitigation Plan. The SUSMP shall address conditions and requirements of new development.

"Total Maximum Daily Load (TMDL)" means the sum of the individual waste load allocations for point sources and load allocations for nonpoint sources and natural background.

"Toxicity Identification Evaluation (TIE)" means a set of procedures to identify the specific chemical(s) responsible for toxicity. These procedures are performed in three phases (characterization, identification, and confirmation) using aquatic organism toxicity tests.

"Toxicity Reduction Evaluation (TRE)" means a study conducted in a step-wise process to identify the causative agents of effluent or ambient toxicity, isolate the sources of toxicity, evaluate the effectiveness

of toxicity control options, and then confirm the reduction in toxicity.

"Treatment" means the application of engineered systems that use physical, chemical, or biological processes to remove pollutants. Such processes include, but are not limited to, filtration, gravity settling, media absorption, biodegradation, biological uptake, chemical oxidation and UV radiation.

"Treatment Control BMP" means any engineered system designed to remove pollutants by simple gravity settling of particulate pollutants, filtration, biological uptake, media absorption or any other physical, biological, or chemical process.

"USEPA Phase I Facilities" means facilities in specified industrial categories that are required to obtain an NPDES permit for storm water discharges, as required by 40 CFR 122.26(c). These categories include:

i. facilities subject to storm water effluent limitation guidelines, new source performance standards, or toxic pollutant effluent standards (40 CFR N)

ii. manufacturing facilities

iii. oil and gas/mining facilities

iv. hazardous waste treatment, storage, or disposal facilities

v. landfills, land application sites, and open dumps

vi. recycling facilities

vii. steam electric power generating facilities

viii. transportation facilities

ix. sewage of wastewater treatment works

x. light manufacturing facilities

"Vehicle Maintenance/Material Storage Facilities/ Corporation Yards" means any Permittee owned or operated facility or portion thereof that:

i. Conducts industrial activity, operates equipment, handles materials, and provides services similar to Federal Phase I facilities;

ii. Performs fleet vehicle service/maintenance on ten or more vehicles per day including repair, maintenance, washing, and fueling;

iii. Performs maintenance and/or repair of heavy industrial machinery/equipment ; and

iv. Stores chemicals, raw materials, or waste materials in quantities that require a hazardous materials business plan or a Spill Prevention, Control, and Counter-measures (SPCC) plan.

"Water Quality Standards and Water Quality Objectives" means water quality criteria contained in the Basin Plan, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federally approved surface water quality plans. Such plans are used by the Regional Board

to regulate all discharges, including storm water discharges.

"Waters of the State" means any surface water or groundwater, including saline waters, within boundaries of the state.

"Waters of the United States" or "Waters of the U.S." means:

a. All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

b. All interstate waters, including interstate "wetlands";

c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

   1. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

   2. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

3. Which are used or could be used for industrial purposes by industries in interstate commerce;

d. All impoundments of waters otherwise defined as waters of the United States under this definition;

e. Tributaries of waters identified in paragraphs (a) through (d) of this definition;

f. The territorial sea; and

g. "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.22(m), which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to man-made bodies of water, which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the CWA, the final authority regarding CWA jurisdiction remains with USEPA.

"Wave Wash" means the point at which a storm drain or creek empties and the effluent from the storm drain initially mixes with the receiving ocean water.

"Wet Season" means the calendar period beginning October 1 through April 15.

Part 6. STANDARD PROVISIONS

A. Standard Requirements

1. Each Permittee shall comply with all provisions and requirements of this permit.

2. Should a Permittee discover a failure to submit any relevant facts or that it submitted incorrect information in a report, it shall promptly submit the missing or correct information.

3. Each Permittee shall report all instances of non-compliance not otherwise reported at the time monitoring reports are submitted.

4. This Order includes the attached Monitoring and Reporting Program, and SUSMP (Regional Board Resolution No. R00-02), which are a part of the permit and must be complied with in the same manner as with the rest of the requirements in the permit.

B. Regional Board Review

Any formal determination or approval made by the Regional Board Executive Officer pursuant to the provisions of this Order may be reviewed by the Regional Board. A Permittee(s) or a member of the public may request such review upon petition within 30 days of the effective date of the notification of such decision to the Permittee(s)

and interested parties on file at the Regional Board.

C. Public Review

1. All documents submitted to the Regional Board in compliance with the terms and conditions of this Order shall be made available to members of the public pursuant to the Freedom of Information Act (5 U.S.C. § 552 (as amended) and the Public Records Act (Cal. Government Code § 6250 *et seq.*).

2. All documents submitted to the Regional Board Executive Officer for approval shall be made available to the public for a 30-day period to allow for public comment.

D. Duty to Comply

1. Each Permittee must comply with all of the terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act, its regulations and the California Water Code, and is grounds for enforcement action, Order termination, Order revocation and reissuance, denial of an application for reissuance; or a combination thereof [40 CFR 122.41(a), CWC § 13261, 13263, 13265, 13268, 13300, 13301, 13304, 13340, 13350].

2. A copy of these waste discharge specifications shall be maintained by each Permittee so as to be available during normal business

hours to Permittee employees and members of the public.

3. Any discharge of wastes at any point(s) other than specifically described in this Order is prohibited, and constitutes a violation of the Order.

E. Duty to Mitigate [40 CFR 122.41(d)]

Each Permittee shall take all reasonable steps to minimize or prevent any discharge that has a reasonable likelihood of adversely affecting human health or the environment.

F. Inspection and Entry [40 CFR 122.41(i), CWC § 13267]

The Regional Board, USEPA, and other authorized representatives shall be allowed:

1. Entry upon premises where a regulated facility is located or conducted, or where records are kept under conditions of this Order;

2. Access to copy any records, at reasonable times, that are kept under the conditions of this Order;

3. To inspect at reasonable times any facility, equipment (including monitoring and control equipment), practices, or operations regulated or required under this Order; and,

4. To photograph, sample, and monitor at reasonable times for the purpose of assuring

compliance with this Order, or as otherwise authorized by the CWA and the CWC.

G. Proper Operation and Maintenance [40 CFR 122.41(e), CWC § 13263(f)]

The Permittees shall at all times properly operate and maintain all facilities and systems of treatment (and related appurtenances) that are installed or used by the Permittees to achieve compliance with this Order. Proper operation and maintenance includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities or similar system that are installed by a Permittee only when necessary to achieve compliance with the conditions of this Order.

H. Signatory Requirements [40 CFR 122.41(k) & 122.22]

Except as otherwise provided in this Order, all applications, reports, or information submitted to the Regional Board shall be signed by the Director of Public Works, City Engineer, or authorized designee and certified as set forth in 40 CFR 122.22.

I. Reopener and Modification [40 CFR 122.41(f) & 122.62]

1. This Order may only be modified, revoked, or reissued, prior to the expiration date, by the

Regional Board, in accordance with the procedural requirements of the CWC and CCR Title 23 for the issuance of waste discharge requirements, 40 CFR 122.62, and upon prior notice and hearing, to:

a) Address changed conditions identified in the required reports or other sources deemed significant by the Regional Board;

b) Incorporate applicable requirements or statewide water quality control plans adopted by the State Board or amendments to the Basin Plan;

c) Comply with any applicable requirements, guidelines, and/or regulations issued or approved pursuant to CWA Section 402(p); and/or,

d) Consider any other federal, or state laws or regulations that became effective after adoption of this Order.

2. After notice and opportunity for a hearing, this Order may be terminated or modified for cause, including, but not limited to:

a) Violation of any term or condition contained in this Order;

b) Obtaining this Order by misrepresentation, or failure to disclose all relevant facts; or,

c) A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

3. The filing of a request by the Principal Permittee or Permittees for a modification, revocation and re-issuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any condition of this Order.

4. This Order may be modified to make corrections or allowances for changes in the permitted activity listed in this section, following the procedures at 40 CFR 122.63, if processed as a minor modification. Minor modifications may only:

   a) Correct typographical errors, or

   b) Require more frequent monitoring or reporting by the Permittee.

J. Severability

The provisions of this permit are severable; and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances and the remainder of this permit shall not be affected.

K. Duty to Provide Information [40 CFR 122.41(h)]

The Permittees shall furnish, within a reasonable time, any information the Regional Board or

USEPA may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this Order. The Permittees shall also furnish to the Regional Board, upon request, copies of records required to be kept by this Order.

L. Twenty-four Hour Reporting [40 CFR 122.41(l)(6)][8]

1. The Permittees shall report to the Regional Board any noncompliance that may endanger health or the environment. Any information shall be provided orally within 24 hours from the time any Permittee becomes aware of the circumstances. A written submission shall also be provided within five days of the time the Permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times and, if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

2. The Regional Board may waive the required written report on a case-by-case basis.

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[8] This provision applies to incidents where effluent limitations (numerical or narrative) as provided in this Order or in the Los Angeles County SQMP are exceeded, and which endanger public health or the environment.

M. Bypass [40 CFR 122.41(m)][9]

Bypass (the intentional diversion of waste streams from any portion of a treatment facility) is prohibited. The Regional Board may take enforcement action against Permittees for bypass unless:

1. Bypass was unavoidable to prevent loss of life, personal injury or severe property damage. (Severe property damage means substantial physical damage to property, damage to the treatment facilities that causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.);

2. There were no feasible alternatives to bypass, such as the use of auxiliary treatment facilities, retention of untreated waste, or maintenance during normal periods of equipment down time. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that could occur during normal periods of equipment downtime or preventive maintenance;

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[9] This provision applies to the operation and maintenance of storm water controls and BMPs as provided in this Order or in the SQMP.

3. The Permittee submitted a notice at least ten days in advance of the need for a bypass to the Regional Board; or,

4. Permittees may allow a bypass to occur that does not cause effluent limitations to be exceeded, but only if it is for essential maintenance to assure efficient operation. In such a case, the above bypass conditions are not applicable. The Permittee shall submit notice of an unanticipated bypass as required.

N. Upset [40 CFR 122.41(n)][10]

Upset means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

1. A Permittee that wishes to establish the affirmative defense of an upset in an action brought for non compliance shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

   a) An upset occurred and that the Permittee can identify the cause(s) of the upset;

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[10] *Supra*. See footnote number 3.

b) The permitted facility was being properly operated by the time of the upset;

c) The Permittee submitted notice of the upset as required; and,

d) The Permittee complied with any remedial measures required.

2. No determination made before an action for noncompliance, such as during administrative review of claims that non-compliance was caused by an upset, is final administrative action subject to judicial review.

3. In any enforcement proceeding, the Permittee seeking to establish the occurrence of an upset has the burden of proof.

O. Property Rights [40 CFR 122.41(g)]

This Order does not convey any property rights of any sort, or any exclusive privilege.

P. Enforcement

1. Violation of any of the provisions of the NPDES permit or any of the provisions of this Order may subject the violator to any of the penalties described herein, or any combination thereof, at the discretion of the prosecuting authority; except that only one kind of penalties may be applied for each kind of violation. The CWA provides the following:

a) Criminal Penalties for:

(1) Negligent Violations:

The CWA provides that any person who negligently violates permit conditions implementing § 301, 302, 306, 307, 308, 318, or 405 is subject to a fine of not less than $2,500 nor more than $25,000 per day for each violation, or by imprisonment for not more than 1 year, or both.

(2) Knowing Violations:

The CWA provides that any person who knowingly violates permit conditions implementing § 301, 302, 306, 307, 308, 318, or 405 is subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

(3) Knowing Endangerment:

The CWA provides that any person who knowingly violates permit conditions implementing § 301, 302, 307, 308, 318, or 405 and who knows at that time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than 15 years, or both.

(4) False Statement:

The CWA provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or by both. If a conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or by both. (See CWA § 309(c)(4))

b) Civil Penalties

The CWA provides that any person who violates a permit condition implementing § 301, 302, 306, 307, 308, 318, or 405 is subject to a civil penalty not to exceed $27,500 per day for each violation.

2. The CWC provides that any person who violates a waste discharge requirement provision of the CWC is subject to civil penalties of up to $5,000 per day, $10,000 per day, or

$25,000 per day of violation; or when the violation involves the discharge of pollutants, is subject to civil penalties of up to $10 per gallon per day or $25 per gallon per day of violation; or some combination thereof, depending on the violation or combination of violations.

Q. Need to Halt or Reduce Activity not a Defense [40 CFR 122.41(c)]

It shall not be a defense for a Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this Order.

R. Rescission

Regional Board Order No. 96-054 is hereby rescinded.

S. Expiration

This Order expires on December 12, 2006. The Permittees must submit a Report of Waste Discharges and a proposed Storm Water Quality Management Program in accordance with CCR Title 23 as application for reissuance of waste discharge requirements no later than June 12, 2006.

I, Dennis A. Dickerson, Regional Board Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the

California Regional Water Quality Control Board, Los Angeles Region, on December 13, 2001.

_____

Dennis A. Dickerson
Executive Officer

Los Angeles County Municipal Storm Water Permit
NPDES No. CAS004001

Order No. 01-182

ATTACHMENT A
LIST OF PERMITTEES
BY
WATERSHED MANAGEMENT AREAS

Santa Monica Bay

Malibu Creek and Other Rural
Agoura Hills
*Calabasas
Los Angeles County Flood Control
Los Angeles County
Malibu
Westlake Village

Ballona Creek and Other Urban
Beverly Hills
Culver City
El Segundo
Hermosa Beach
Los Angeles (City of)

Los Angeles River

Alhambra
Arcadia
Bell
Bell Gardens
Burbank
Commerce
Compton
Cudahy
El Monte
*Glendale
Hidden Hills
Huntington Park
La Canada Flintridge
Los Angeles (City of)
Los Angeles County Flood Control
Los Angeles (County of)

Los Angeles County Flood Control
Los Angeles (County of)
Manhattan Beach
Palos Verdes Estates
Ranch Palos Verdes
Redondo Beach
Rolling Hills
Rolling Hills Estates
*Santa Monica
West Hollywood

Dominguez Channel/ Los Angeles Harbor Drainage
Carson
Gardena
Hawthorne
Inglewood
Lawndale
Lomita
Los Angeles (City of)
Los Angeles County Flood Control
Los Angeles (County of)
*Torrance

San Gabriel River
Artesia
Azusa
Baldwin Park
Bellflower
Bradbury
Cerritos
Claremont
Covina
Diamond Bar
Lynwood
Maywood
Monrovia
Montebello
Monterey Park
Paramount
Pasadena
Rosemead
San Fernando
San Gabriel
San Marino
Sierra Madre
Signal Hill
South El Monte
South Gate
South Pasadena
Temple City
Vernon

Downey
Duarte
Glendora
Hawaiian Gardens
Industry
Irwindale
La Habra Heights
La Mirada
La Puente
La Verne
Lakewood
*Long Beach[1]
Los Angeles County Flood Control
Los Angeles (County of)
Norwalk
Pomona
Pico Rivera
San Dimas
Santa Fe Springs
Walnut
West Covina
Whittier

Santa Clara River
*Santa Clarita
Los Angeles County Flood Control
Los Angeles (County of)

*Italicized agencies are present in more than one Watershed Management Area. *Indicates City with the largest watershed population other than County of Los Angeles and the City of Los Angeles.*

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[1] *The City of Long Beach is covered under order No. 99-060*

UNDERLINE/STRIKEOUT VERSION OF CHANGES TO SHORELINE MONITORING REQUIREMENTS MADE ON JUNE 15, 2005

State of California
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION
MONITORING AND REPORTING PROGRAM – CI 6948
FOR
ORDER No. 01-182
NPDES No. CAS004001
MUNICIPAL STORM WATER AND URBAN RUNOFF DISCHARGES WITHIN THE COUNTY OF LOS ANGELES, AND THE INCORPORATED CITIES, EXCEPT THE CITY OF LONG BEACH

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I. Program Reporting Requirements

The Principal Permittee shall submit, no later than October 15 of each year beginning in the year 2002, a Unified Annual Storm Water Report (Unified Annual Report) documenting the progress of Permittees' implementation of the SQMP and the requirements of this Order. The Unified Annual Report shall contain a section covering common activities conducted collectively by the Permittees, and an integrated summary of the Monitoring Program results. Each Permittee shall submit an Individual Annual Report to the Principal Permittee, by the date determined by the Principal Permittee, to be included in the Unified Annual Report. The Unified Annual Reports shall cover each fiscal year from July 1 through June 30. The first Unified Annual Report, to be submitted on October 15, 2002, shall report for the period from July 1, 2001 through June 30, 2002. Specific requirements that must be addressed in the Annual Reports are listed below.

A. Unified Annual Report

The Principal Permittee shall include the following in the Unified Annual Report:

1. A compilation of Permittee Individual Annual Reports.

2. Proposed changes to the SQMP, as recommended by the WMCs.

3. An assessment of the effectiveness of SQMP requirements to reduce storm water pollution. This assessment shall be comprised of a compilation of watershed-wide assessments conducted by each WMC. Assessments shall be based upon the specific record-keeping information requirement in each section of the permit, monitoring data, summaries of program effectiveness from each Permittee, and any other information related to program effectiveness. The program assessment shall include summaries of the following:

   a) Summary of common activities conducted by all Permittees;

   b) WMA BMP implementation;

   c) Identification of management measures proven to be effective and/or ineffective at reducing urban runoff pollutants and flow;

   d) Permittee level of effort, as indicated in their Individual Annual Report self evaluations (Attachment U-4, section VI); and

   e) Integrated summary of Monitoring Program results, including the identification of water quality improvements or degradation, and recommendations for improvements to the SQMP (including proposed BMPs)

based on the results from the Monitoring Program.

4. Pursuant to Part 2 of this Order, after a determination by either a Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, a Receiving Water Limitations (RWL) Compliance Report shall be attached to the subsequent Unified Annual Report. A status RWL Compliance Report shall be submitted every alternate year following the submittal of the first Report. The RWL Compliance Report shall include the following:

   a) A plan to comply with the RWL (Part 2 of this Order);

   b) Changes to the SQMP to eliminate water quality exceedances;

   c) Enhanced monitoring to demonstrate compliance; and

   d) Results of implementation.

   After all water quality exceedances have been abated, a RWL Compliance Report is not required.

B. Individual Annual Reports

Each Individual Annual Report shall document and describe all activities conducted by a Permittee to meet all requirements of this Order, during the completed annual reporting period. Individual Annual Reports shall use the attached form (Attachment U-4), or

create another reporting format that includes all items on the attached form. Each Permittee shall complete the form in its entirety, except for those requirements applicable only to the Principal Permittee, as indicated on the form. Status of compliance with permit requirements including implementation dates for all time-specific deadlines should be included for each program area. If permit deadlines are not met, Permittees shall report the reasons why the requirement was not met and how the requirements will be met in the future, including projected implementation dates. A comparison of program implementation results to performance standards established in this Order and in the SQMP shall be included for each program area.

C. Monitoring Program Management

The Principal Permittee shall submit a Storm Water Monitoring Report (Monitoring Report) on August 15, 2002, and annually on August 15, thereafter. The Monitoring Report to be submitted on August 15, 2002 shall include the results of monitoring from July 1, 2001 through June 30, 2002. Each Monitoring Report shall include:

1. Status of implementation of the Monitoring Program.

2. Data, results, methods of evaluating the data, graphical summaries of the data, and an explanation/discussion of the data for each component of the monitoring

program, including any specific reporting requirements included in Section II. Monitoring Program.

3. An analysis of the findings of each Monitoring Program component. The analysis shall identify and prioritize water quality problems. Based on the identification and prioritization of water quality problems, the analysis shall identify potential sources of the problems, and recommend future monitoring and BMP implementation measures for identifying and addressing the sources. The analysis shall also include an evaluation of the effectiveness of existing control measures.

4. Identification and analysis of any long-term trends in storm water or receiving water quality.

5. An estimation of total pollutant loads due to storm water/urban runoff for each mass emission station.

6. A comparison to the applicable Water Quality Standards for each component of the Monitoring Program. The lowest applicable standard from the Basin Plan, the Ocean Plan, or the CTR shall be used for comparison. Constituents that exceed applicable Water Quality Standards shall be highlighted. When data indicate that discharges are causing or contributing to exceedances of applicable Water Quality Standards, a discussion of possible pollutant sources shall be

included in the Monitoring Report and a RWL Compliance Report (Section I.A.4) shall be submitted with the subsequent Unified Annual Report.

7. For each monitoring component, maps of all monitoring station locations and descriptions of each location.

8. All Monitoring Reports shall be submitted in both electronic and paper formats.

D. Integrated Receiving Water Impacts Report

The Principal Permittee shall, not later than August 15, 2005, prepare and submit an Integrated Receiving Water Impacts Report, which may also serve as the fourth-year Monitoring Report. The Report shall include, but not be limited to, a comprehensive analysis of the results of the data from each component of the Monitoring Program, and other pertinent studies available, and feasible environmental indicators. It should also include a budget summary for each monitoring requirement and recommendations on future monitoring requirements. This report will be an integral part of the next ROWD.

E. Certification

All applications, reports, or information submitted to the Regional Board shall be signed and certified pursuant to US EPA regulations at 40 CFR 122.41(k). Each report shall contain the following completed declaration:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted.

Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility, of a fine and imprisonment for knowing violations.

Executed on the ___ day of _____, 20__,

at _____.

(Signature) _____ (Title) _____";

Permittee submittals to the Principal Permittee shall also be signed and certified pursuant to USEPA regulations 40 CFR 122.41(k).

The Principal Permittee shall submit the original of each Unified Annual Report to:

INFORMATION TECHNOLOGY
CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD – LOS ANGELES REGION
320 W. 4TH STREET, SUITE 200
LOS ANGELES, CA 90013

A copy of the Unified Annual Report shall also be mailed to:

REGIONAL ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, CA 94105

II. Monitoring Program

The primary objectives of the Monitoring Program include, but are not limited to:

- Assessing compliance with this Order;
- Measuring and improving the effectiveness of the SQMPs;
- Assessing the chemical, physical, and biological impacts of receiving waters resulting from urban runoff;
- Characterization of storm water discharges;
- Identifying sources of pollutants; and
- Assessing the overall health and evaluating long-term trends in receiving water quality.

Ultimately, the results of the monitoring requirements outlined below should be used to refine the SQMP for the reduction of pollutant loadings and the protection and enhancement of the beneficial uses of the receiving waters in Los Angeles County.

The Principal Permittee and Permittees shall implement the Monitoring Program as follows:

CORE MONITORING

A. Mass Emissions

The Principal Permittee shall monitor mass emissions to accomplish the following objectives:

- Estimate the mass emissions from the MS4;
- Assess trends in the mass emissions over time; and
- Determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to applicable standards in the Basin Plan, the Ocean Plan, or the CTR, and with emissions from other dischargers.

1. The Principal Permittee shall monitor mass emissions from the following seven mass emission stations: Ballona Creek, Malibu Creek, Los Angeles River, San Gabriel River, Coyote Creek, Dominguez Channel, and the Santa Clara River. The Principal Permittee shall monitor the first storm event and a minimum of 2 additional storm events for each season. A minimum of two dry weather samples per year at each mass emission station shall also be analyzed. Sampling at all stations shall begin no later than February 1, 2002, except for sampling in the Santa Clara River, which will begin no later than October 15, 2002.

2. All storms events, in addition to those required above, that result in at least

0.25 inches of rainfall shall be sampled and analyzed for TSS. Results shall be used to assess the variability of storm water constituents and provide a more accurate estimate of mass emissions (pollutant correlation with TSS). This requirement does not apply to manual sampling stations.

3. Samples for mass emission monitoring may be taken with the same type of automatic sampler used under Order 96-054. Grab samples shall be taken for pathogen indicators and oil and grease. The samplers shall be set to monitor storms that produce 0.25 inches or greater of rainfall. Samples taken at mass emission stations during the first storm event of the wet season shall be analyzed for all constituents listed in Attachment U-1.

4. Manual samples shall be collected from mass emission stations where it is not feasible to install an automatic sampler (Santa Clara River). Manual samples shall be flow-weighted composites, collected during the first 3 hours, or for the duration of the storm if it is less than 3 hours. A minimum of 3 sample aliquots, separated by a minimum of 15 minutes, shall be taken within each hour of discharge[1], unless the

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[1] Required in 40 CFR 122.21(g)(7)(ii), and described in NPDES Storm Water Sampling Guidance Document EPA 833-B-92-001.

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Regional Board Executive Officer approves an alternate protocol.

5. Samples from mass emission stations shall be analyzed for all constituents listed in Attachment U-1. If a constituent is not detected at the method detection limit for its respective test method listed in Attachment U-1 in more than 75 percent of the first 48 sampling events, it need not be further analyzed unless the observed occurrences show concentrations greater than state water quality standards. The Principal Permittee will also conduct annual confirmation sampling for non-detected constituents during the first storm of the wet season every year at each station.

6. The Principal Permittee shall perform an annual analysis, to be included in the Monitoring Report, of the correlation between pollutants of concern (including but not limited to metals and PAHs) and TSS loadings for the sampling events that are analyzed for the complete list of constituents.

B. Water Column Toxicity Monitoring

The Principal Permittee shall analyze mass emission samples for toxicity to evaluate the extent and causes of toxicity in receiving

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Time-weighted samples may be appropriate if flow is measured during sampling.

waters and to modify and utilize the SQMP to implement practices that eliminate or reduce sources of toxicity in storm water.

1. The Principal Permittee shall analyze samples from two storm events (including the first storm of each year) and two dry weather events from each mass emission station for toxicity every year. A minimum of one freshwater and one marine species shall be used for toxicity testing for each station event. Specifically, *Ceriodaphnia dubia* (water flea) 7-day survival/reproduction and *Strongylocentrotus purpuratus* (sea urchin) fertilization tests shall be used. These tests should include a dilution series (0.5x steps) that ranges from the undiluted sample (or the highest concentration that can be tested within the limitations of the test methods or sample type) to less than or equal to 6% sample.

2. Toxicity Identification Evaluations (TIE)

   The Principal Permittee shall begin a Phase I TIE immediately on all samples that are substantially toxic (greater than or equal to 1 Toxic Unit) to either test species.[2] If a sample is substantially

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[2] Substantial toxicity means the amount of toxicity necessary to successfully conduct a Phase I TIE. Toxic Units are calculated by dividing 100 by the calculated median test response value (e.g., LC50 or EC50). For example, a LC50 of 50% sample equals 2 Toxic Units. Ceriodaphnia TIEs require at least 50% mortality in undiluted sample (1 Toxic Unit) at any time

(Continued on following page)

toxic to both species, a TIE shall be performed for both species. The Phase I TIE shall include the following treatments and corresponding blanks:

a) Baseline toxicity;

b) Particle removal by centrifugation;

c) Solid phase extraction of the centrifuged sample using C18 media;

d) Complexation of metals using ethylenediaminetetraacetic acid (EDTA) addition to the raw sample;

e) Neutralization of oxidants/metals using sodium thiosulfate addition to the raw sample; and

f) Inhibition of organo-phosphate (OP) pesticide activation using piperonyl butoxide addition to the raw sample (crustacean toxicity tests only).

3. Toxicity Reduction Evaluations (TRE)

a) When the same pollutant or class of pollutants is identified through the TIE process as causing at least 50% of the toxic responses in at least 3 samples at a sampling location, a TRE shall be performed for that identified toxic pollutant. TRE development shall be performed by a neutral third party (retained by the

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during the 7-day duration of the initial chronic bioassay (SCCWRP).

Principal Permittee), with input from Permittees and Regional Board staff. The TRE shall include all reasonable steps to identify the source(s) of toxicity and discuss appropriate BMPs to eliminate the causes of toxicity. Once the source of toxicity and appropriate BMPs are identified, the Principal Permittee shall submit the TRE to the Regional Board Executive Officer for approval. At a minimum, it shall include a discussion of the following items:

(1) The potential sources of pollutant(s) causing toxicity;

(2) A list of municipalities that may have jurisdiction over sources of pollutant(s) causing toxicity;

(3) Recommended BMPs to reduce the pollutant(s) causing toxicity;

(4) Proposed changes to the SQMP to reduce the pollutant(s) causing toxicity; and

(5) Suggested follow-up monitoring to demonstrate that toxicity has been removed.

b) Since the Phase I TIEs may only identify a broad category of toxicants (e.g., nonpolar organics), additional TIE analyses may be required in order to identify or confirm the identity of the pollutants causing

toxicity before the TRE can be completed.

c) If TRE implementation for a specific pollutant coincides with TMDL implementation for that pollutant, the efforts may be coordinated.

d) Upon approval by the Regional Board Executive Officer, the Permittee(s) having jurisdiction over sources causing or contributing to toxicity shall implement the recommended BMPs and take all reasonable steps necessary to eliminate toxicity.

e) The Principal Permittee shall be responsible for the development of a maximum of two TREs per year. If applicable, the Principal Permittee may use the same TRE for the same toxic pollutant or pollutant class in different watersheds. The TRE process shall be coordinated with TMDL development and implementation (ie. If a TMDL for zinc is being implemented when a TRE for zinc is required, the efforts shall be coordinated to avoid overlap).

f) The Principal Permittee shall report on the development, implementation, and results for each TRE in the annual Monitoring Report, beginning the year following the identification of each pollutant or pollutant class causing toxicity.

C. Tributary Monitoring

The Principal Permittee shall monitor tributaries to identify sub-watersheds where storm water discharges are causing or contributing to exceedances of Water Quality Standards, and to prioritize drainage and sub-drainage areas that need management actions.

1. The Principal Permittee shall develop and implement a watershed-based tributary monitoring program, in which a minimum of six tributaries per year will be monitored, based on the schedule described below:

   a) Monitoring station locations will be rotated so that a minimum total of six tributaries will be monitored per year. Each tributary shall be monitored for a minimum period of one year. If no exceedances of applicable water quality standards occur during one year of monitoring at a single tributary station, the Principal Permittee may move that monitoring station to another tributary, subject to the approval of the Regional Board Executive Officer. When an applicable water quality standard is exceeded in three out of four sampling events in a given monitoring year, the Permittees shall initiate a focused effort to identify sources of pollutants within that subwatershed.

b) Tributary monitoring shall begin in the Los Angeles River WMA, and shall be rotated to locations in other watersheds as monitoring at each station is complete, as approved by the Regional Board Executive Officer. The Principal Permittee shall include a description and explanation of each proposed station location and a summary of the prior year's results of the tributary monitoring program in the annual Monitoring Report.

c) Monitoring shall begin at the following tributaries:

(1) Aliso Creek;

(2) Bull Creek;

(3) Arroyo Seco Channel;

(4) Rio Hondo Channel;

(5) Burbank West; and

(6) Verdugo Wash.

2. Tributary monitoring shall begin October 15, 2002.

3. The Principal Permittee shall monitor the first storm event and at least 3 additional storm events during each storm season. At least one dry weather flow per year will also be sampled at each station.

4. Samples shall be flow-weighted composites, collected during the first 3 hours or

for the duration of the storm if it is less than 3 hours. Samples may be collected manually or automatically. A minimum of 3 sample aliquots, separated by a minimum of 15 minutes, shall be taken within each hour of discharge[3], unless the Regional Board Executive Officer approves an alternate protocol. Samples shall be taken just upstream of the tributary's confluence with the mainstem. Constituents to be analyzed for each location shall include the following:

a) pH, dissolved oxygen, temperature, conductivity, and total suspended solids;

b) Indicator bacteria;

c) All priority pollutants (Attachment U-1) for the first storm of the year;

d) All constituents for which the water body is impaired downstream of the monitoring station;[4]

e) All constituents that caused toxicity or exceeded any applicable water quality criteria at the associated

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[3] Required in 40 CFR 122.21(g)(7)(ii), and described in NPDES Storm Water Sampling Guidance Document EPA 833-B-92-001. Time-weighted samples may be appropriate if flow is measured during sampling.

[4] The 1998 California 303(d) List and TMDL Priority Schedule lists pollutants for which each water body is impaired, www.swrcb.ca.gov/tmdl/docs/303d98.pdf#reg4

mass emission station the previous year (these constituents shall be listed in each Monitoring Report); and

f) Flow (flow may be estimated using EPA methods[5] at sites where flow measurement devices are not in place).

D. Shoreline Monitoring

The City of Los Angeles shall monitor shoreline stations to evaluate the impacts to coastal receiving waters and the loss of recreational beneficial uses resulting from storm water/urban runoff. This component shall be integrated and coordinated with similar monitoring programs in the region.

1. The City of Los Angeles shall monitor eighteen water quality sampling stations and supplement the monitoring conducted by the County of Los Angeles Department of Health Services at two additional water quality stations along the shoreline of the Pacific Ocean within the Santa Monica Bay to determine compliance with the California's bathing water standards for public beaches and ocean water-contact sport areas[6], and

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[5] NPDES Storm Water Sampling Guidance Document, EPA 833-B-92-001, July 1992

[6] California Department of Health Services, Health and Safety Code §115880 (Assembly Bill 411, Statutes of 1997, Chapter 765

the related impacts of discharges from storm drains and piers. The shoreline monitoring program shall be implemented as follows:

a) The eighteen established shoreline water quality stations listed in Attachment U-2 shall be monitored. Station locations may be modified based on recommendations from the Santa Monica Bay Restoration ~~Project~~ Commission (~~SMBRP~~SMBRC) and approval from the Regional Board Executive Officer[7];

b) The City of Los Angeles shall supplement the weekly sampling done by the Los Angeles Department of Health Services at two additional shoreline monitoring locations, Manhattan Beach at 28th Street (DHS 113) and the Herondo storm drain (DHS 115), to increase sampling frequency at these sites to 5 times per week.

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[7] Station locations were modified based on the recommendations of the SMBRC TAC at its November 23, 2004 meeting on [insert date] to align the shoreline monitoring program contained herein with that of the Santa Monica Bay Beaches Bacterial TMDLs Coordinated Shoreline Monitoring Plan, April 7, 2004, developed to assess compliance with the requirements of the Bacteria TMDLs for Santa Monica Bay Beaches.

c) The City of Los Angeles shall evaluate three additional sites, Temescal Canyon (DHS 102), Bel Air Bay Club (DHS 103), and Montana Avenue (DHS 104), for storm water impact and the necessity of increasing monitoring frequency to 5 times per week. The City of Los Angeles shall report its findings to the Regional Board no later than September 16, 2005. The Regional Board Executive Officer will make a final determination regarding sampling frequency at these sites on the basis of the report. If more frequent sampling is required at one or more of these sites by the Regional Board, the City of Los Angeles shall supplement, as necessary, the weekly sampling done by the Los Angeles County Department of Health Services to increase the sampling frequency to 5 times per week until this Order is readopted.

~~b)~~d) Three indicator groups shall be tested for using either membrane filtration, multiple tube fermentation, or chromogenic substrate test kits. Monitoring shall include the following types ~~and frequencies~~ of sampling:

Parameter	Units	~~Sample Frequency~~
Total coliforms	CFU or MPN/100 ml	~~6/week (Mon-Sat)~~[8]
Fecal coliform[9]	CFU or MPN/100 ml	~~6/week (Mon-Sat)~~[8]
Enterococcus	CFU or MPN/100 ml	~~6/week (Mon-Sat)~~[8]

e) Sample frequency shall be either weekly or 5 times per week, depending upon historical shoreline monitoring data. Days not sampled shall be Sundays and Mondays or Tuesdays. Sampling shall be conducted 5 times per week at shoreline monitoring sites with historical water quality that is worse than the reference beach identified in the Santa Monica Bay Beaches Bacteria TMDLs (Resolutions 2002-004 and 2002-022). Systematic weekly sampling shall be conducted at shoreline monitoring sites with historical water quality that is as good as or better than the reference beach.[10]

(1) Sampling shall be conducted 5 times per week at the following sites listed in Attachment U-2:

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[8] ~~Samples will be collected on Sundays preceding Monday holidays~~

[9] *Escherichia Coli (E. Coli)* may be substituted for Fecal Coliform if chromogenic substrate test kits are used

[10] As recommended by the SMBRC at its November 23, 2004 meeting, and approved by the Regional Board Executive Officer on [insert date].

S1, S2, S4, S5, S6, S7, S9, S10, and S16.

(2) Sampling shall be conducted once per week at the following sites listed in Attachment U-2: S3, S8, S11, S12, S13, S14, S15, S17, and S18.

~~e)~~f) Shoreline monitoring shall occur during daylight hours. Samples may be omitted in the event of hazardous weather;

~~d)~~g) Shoreline monitoring frequencies at certain stations may be modified based on the use of the adjacent beaches and their proximity to storm drains, as recommended by the ~~SMBRP's~~ SMBRC's Technical Advisory Committee and the Los Angeles County Department of Health Services (LA County DHS).

~~e)~~h) Data collected shall be transmitted daily to the LA County DHS. The City of Los Angeles will annually assess the data and submit it to the Principal Permittee for inclusion in the Monitoring Report;

~~f)~~i) When exceedances of public health standards for bacteria occur, the LA County DHS shall take the appropriate action, as described in the

Regulations for Public Beaches and Ocean Water-Contact Sports Areas.[11]

~~g)~~i) The City of Los Angeles will continue to conduct all monitoring, testing, and data transferring actions as part of the Santa Monica Bay Restoration Commission (SMBR~~P~~C) ~~r~~Regional ~~p~~Program for the Santa Monica Bay.

E. Trash Monitoring

To assess the quantities of trash in receiving waters after storm events and to identify areas impaired for trash, the Principal Permittee shall conduct visual observations of trash and take a minimum of one photograph at each mass emission station after the first storm event and 3 additional storm events per year.

1. The Principal Permittee and Permittees in the Los Angeles River and Ballona Creek WMAs (listed in Permit Attachment A) shall develop and implement a trash monitoring program for the Los Angeles River and Ballona Creek watersheds no later than October 15, 2002. The monitoring program and schedule shall be consistent with and pursuant to CWC §13267 "Request for Trash Monitoring", issued by the Regional Board on

[11] Regulations for Public Beaches and Ocean Water-Contact Sports Areas, Title 17 CCR Group 10, developed in response to Health and Safety Code §115880

December 21, 2001. For the first two years of monitoring, either of the following formats for monitoring plans may be used:

a) For each watershed, the group of Permittees in that watershed will capture and quantify trash from an area no less than 10% of the total land area over which they have jurisdiction: The monitoring areas shall represent 10% of every land use the group of Permittees has jurisdiction over. If storm drain configuration versus land use make the representation of 10% of a land use infeasible, the Permittees can choose areas that represent their land uses as accurately as possible, as long as the extent of the surface being monitored represents 10%. This monitoring shall use full capture devices. During wet weather, all sampling devices will be emptied within 72 hours of every rain event of 0.25 inch or greater. During dry weather, sampling devices will be emptied and analyzed every three months in the absence of precipitation.

b) For each watershed, the group of Permittees in that watershed will sample a minimum of ten representative sites for each land use monitored. For each sampling site, a

minimum of five catch basins will be fitted with inserts, for a total of not less than 50 catch basin inserts per land use monitored. The existing litter removal practices that the cities implement will remain in place, so that monitoring will evaluate how much trash is washed into the system under current practices. A structural full capture device shall be installed downstream of at least one sampling site for each land use monitored. For this sampling site, all of the catch basins that are upstream of the full capture-monitoring device must be fitted with inserts. This configuration will provide information on the relative effectiveness of the catch basin inserts as opposed to the full capture systems in varying land uses and under varying weather conditions. During wet weather, all sampling devices will be emptied within 72 hours of every rain event of 0.25 inch or greater. During dry weather, sampling devices will be emptied and analyzed every three months in the absence of precipitation.

2. Permittees shall report data in a single unit of measure that is reproducible and measures the amount of trash, irrespective of water content (e.g. compacted volume based on a standardized compaction rate, or dry weight). Permittees may

select the unit, but all Permittees must use the same unit of measure.

3. Following the first two years of data collection, Permittees shall conduct compliance monitoring, which involves calculating trash loading as a running three-year average (estimated total load discharged from 2003-2006, divided by three).

4. All trash collected shall be disposed of in compliance with all applicable State, federal, and local regulations.

REGIONAL MONITORING

The Principal Permittee shall participate on regional monitoring committees to help establish ongoing regional programs that address public health concerns, monitor trends in natural resources and nearshore habitats, and assess regional impacts from all pollutant sources. Regional Monitoring participation shall include, but not necessarily be limited to, the efforts described below.

F. Estuary Sampling

The Southern California Coastal Waters Research Project (SCCWRP), in conjunction with the USEPA, the State Board, three Regional Boards, and participating dischargers, has organized an effort to implement a regional monitoring program for the southern California bight. Previous studies (in 1994 and 1998) included microbiology, water

quality, sediment chemistry, sediment toxicity testing, benthic infauna, demersal fish, and bioaccumulation. A similar bight-wide monitoring effort is planned to be conducted in 2003. The Principal Permittee shall participate on the Steering Committee for this bight-wide monitoring project, and complete the estuary sampling requirement described below in parallel with this effort.

In addition to participation in the Bight-wide study, the goal of this requirement is to sample estuaries for sediment chemistry, sediment toxicity, and benthic macroinvertibrate community to determine the spatial extent of sediment fate from storm water, and the magnitude of its effects. A map of each estuary which depicts the impacted areas shall be produced. The maps shall provide the information necessary to conduct effective sediment monitoring to determine trends and accumulation, as a future permit requirement.

1. The Principal Permittee shall sample a maximum of 25 sites in each estuary/ mouth (Ballona Creek, Malibu Creek, Los Angeles River, San Gabriel River, and Dominguez Channel) once during the permit term. Sediment samples shall be taken at each station by means of a $0.1m^2$ ($1.1\ ft^2$) modified Van Veen sediment grab sampler.
2. The Principal Permittee shall also sample a total of 25 sites outside of the direct outfalls to assess cumulative effects.

3. All samples shall be analyzed for the following:

   a) Sediment Chemistry (priority pollutants)

   b) Total Organic Carbon (TOC)

   c) Grain size

   d) Sediment Toxicity

      (1) Amphipod survival bioassays shall be conducted on each sediment sample. Toxicity shall be indicated by an amphipod survival rate of 70% or less in a single test.

      (2) Phase I TIEs of interstitial water, using the amphipod test species, shall be conducted for samples from stations identified to be toxic in a single amphipod survival bioassay.

   e) Benthic Macroinvertibrates

      (1) All sediment samples shall be passed through a 1.0mm (0.039 in) screen to retrieve the benthic organisms. Benthic epifauna and infauna shall be analyzed to determine the structure of the benthic community.

      (2) The Principal Permittee shall identify all organisms to lowest possible taxon.

(3) The Principal Permittee shall determine the Total Biomass of:

(i) Mollusks;

(ii) Echinoderms;

(iii) Annelids/polychaetes

(iv) Crustaceans; and

(v) All other macroinvertebrates.

(4) The Principal Permittee shall determine the community structure analysis, including wet weight of each taxonomic group (listed above), number of species, number of individuals per species, total numerical abundance, species abundance per grab, species richness, species diversity, species evenness and dominance, similarity analysis, cluster analyses, or other appropriate multivariate statistical techniques approved by the Regional Board Executive Officer, and the Infaunal Index[12].

4. The Principal Permittee shall create a map of each estuary depicting degraded areas and the spatial distribution of

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[12] Benthic Response Index for Assessing Infaunal Communities on the Mainland Shelf of Southern California, the SCCWRP

sediment from storm water. In the Integrated Monitoring Report, the Principal Permittee shall suggest appropriate locations for regular sediment monitoring, based on the results of this study.

G. Bioassessment

The Principal Permittee shall continue participation in the Stormwater Monitoring Coalition (SMC), as well as coordinate with the Surface Water Ambient Monitoring Program (SWAMP) being developed by the State Board to complete the bioassessment requirement. The Regional Board anticipates that the SMC will organize an effort to evaluate the biological index approach for southern California and to design a research project for developing an Index of Biological Integrity (IBI) for this region. The SWAMP has begun work on a statewide effort to determine how to identify reference sites with the goal of IBI development. The purpose of the bioassessment requirement is to detect biological trends in receiving waters and to collect data for the development of an IBI for southern California. The ultimate goals of bioassessment are to assess the biological integrity of receiving waters, to detect biological responses to pollution, and to identify probable causes of impairment not detected by chemical and physical water quality analysis.

1. The Principal Permittee shall coordinate with the SMC and SWAMP to identify the most appropriate locations for

bioassessment stations within Los Angeles County.

2. Station selection shall be complete within one year from the date this Order is adopted, and sampling shall begin no later than October of 2003.

3. The Principal Permittee shall monitor a minimum of 20 bioassessment stations in October of each year, beginning in 2003. A minimum of three replicate samples shall be collected at each station during each sampling event.

4. A professional environmental laboratory shall perform all laboratory, quality assurance, and analytical procedures. The Principal Permittee may collect samples when properly trained in CSBP methods. The Principal Permittee shall develop Standard Operation Procedures (SOPs) for the Bioassessment Monitoring Program that describes all procedures and responsible parties. The SOPs must contain step-by-step field, laboratory and data entry procedures, as well as, related QA/QC procedures. There must also be specific information about the bioassessment program including: assessment program description, its organization and the responsibilities of all its personnel; assessment project description and objectives; qualifications of all personnel; and the type of training each member has received. A copy of the

SOPs shall be available to the Regional Board Executive Officer upon request.

5. Field sampling must conform to the SOP established for the California Stream Bioassessment Procedure (CSBP) when appropriate. For sampling of aquatic environments where the CSBP is not appropriate (i.e., an estuary or unwadable stream), California Department of Fish and Game and the Regional Board Executive Officer shall be consulted in order to determine the most appropriate protocol to be implemented. Field crews shall be trained on aspects of the protocol and appropriate safety issues. All field data and sample Chain of Custody (COC) forms must be examined for completion and gross errors by the field crews, the receiving laboratory, and the Principal Permittee. These forms shall be available to California Department of Fish and Game or the Regional Board Executive Officer upon request. Field inspections should be planned with random visits and should be performed by the Principal Permittee, if properly trained in CSBP methods, or an independent auditor. These visits should report on all aspects of the field procedure with corrective action occurring immediately.

6. Taxonomic identification laboratories process the biological samples that usually consist of subsampling organisms,

enumerating and identifying taxonomic groups and entering the information into an electronic format. There should be intra-laboratory QA/QC results for subsampling, taxonomic validation and corrective actions. Biological laboratories should also maintain reference collections, vouchered specimens (the Principal Permittee can request return of their sample voucher collections) and remnant collections. Biological laboratories shall participate in an inter-laboratory (external) taxonomic validation program at a recommended level of 20% for the first two years of the program. If there are no substantial QA/QC problems, the level of external validation may be decreased to 10% in year three upon approval from the Regional Board. External QA/QC should be arranged through the California Department of Fish and Game's Aquatic Bioassessment Laboratory in Rancho Cordova.

7. Sampling, laboratory, quality assurance, and analysis procedures shall follow the standardized "Non-point Source Bioassessment Sampling Procedures" for professional bioassessment as set forth in the California Department of Fish and Game California Stream Bioassessment Procedure (CSBP)[13]. The

[13] California Stream Bioassessment Procedure (Protocol Brief for Biological and Physical/Habitat Assessment in Wadeable

(Continued on following page)

following results and information shall be included in the annual Monitoring Report:

a) All physical, chemical and biological data collected in the assessment;

b) Photographs and GPS locations of all stations;

c) Documentation of quality assurance and control procedures;

d) Analysis that shall include calculation of the metrics used in the CSBP;

e) Comparison of mean biological and habitat assessment metric values between stations and year-to-year trends;

f) Electronic data formatted to the California Department of Fish and Game Aquatic Bioassessment Laboratory for inclusion in the Statewide Access Bioassessment Database; and

g) Copies of all QA/AC documents from laboratories.

Streams), California Department of Fish and Game – Aquatic Bioassessment Laboratory, May 1999. Located at www.dfg.ca.gov/cabw/protocols.html.

SPECIAL STUDIES

H. New Development Impacts Study in the Santa Clara Watershed

The Principal Permittee, with support from the City of Santa Clarita, shall monitor tributaries in the Santa Clara watershed to determine impacts from new development and to compare storm water quality between subwatersheds with and without SUSMPs.

1. The Principal Permittee, in cooperation with the City of Santa Clarita, shall select one station that is representative of a subwatershed in which the majority of development has occurred without SUSMP implementation, and one station (SUSMP station) in a subwatershed in which the majority of the development has/will include SUSMP implementation. Other inputs to runoff, such as septic systems, in the two subwatersheds should be similar.

2. The Principal Permittee shall coordinate with the City of Santa Clarita and the Regional Board to develop a proposed study design, including a description of the drainage areas to be monitored and sampling locations, no later than August 1, 2002. If appropriate, this study may be conducted in conjunction with the Peak Discharge Impact Study, described below.

3. The Principal Permittee shall monitor the first storm event and at least 2

additional storm events during each storm season. At least one dry weather event per year will also be sampled at each station.

4. Samples shall be flow-weighted composites, collected during the first 3 hours, or for the duration of the storm if it is less than 3 hours. Samples may be collected manually or automatically. A minimum of 3 sample aliquots, separated by a minimum of 15 minutes, shall be taken within each hour of discharge[14], unless the Regional Board Executive Officer approves alternate protocol. Constituents to be analyzed for each location shall include the following:

   a) pH, dissolved oxygen, temperature, conductivity, chloride, nitrogen, and TSS;

   b) Metals: aluminum, arsenic, beryllium, cadmium, chromium, copper, iron, lead, mercury, nickel, selenium, silver, and zinc;

   c) Pathogen Indicators (Coliform);

   d) PAHs; and

   e) Flow (flow may be estimated using EPA methods at sites where flow

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[14] Required in 40 CFR 122.21(g)(7)(ii), and described in NPDES Storm Water Sampling Guidance Document EPA 833-B-92-001. Time-weighted samples may be appropriate if flow is measured during sampling.

measurement devices are not in place).

5. The Principal Permittee shall submit an analysis of the data, including a description of each subwatershed, year-to-year changes compared to the amount of development that occurred in each, comparisons between stations, and an analysis of SUSMP effectiveness, with the fourth year Monitoring Report.

I. Peak Discharge Impact Study

The Principal Permittee shall conduct a study to evaluate peak flow control and to determine numeric criteria to prevent or minimize erosion of natural stream channels and banks caused by urbanization.[15] The Principal Permittee may partner with the Ventura County Flood Control District to expand the stream erosion study to the Santa Clara River watershed. The study shall begin no later than August 1, 2002.

J. BMP Effectiveness Study

The Principal Permittee shall conduct or participate in studies to evaluate the effectiveness of structural and treatment control BMPs. The objective of this study shall include the following:

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[15] Permit, Part 4.D.2 (Development Planning Program) requires the development of numerical criteria for peak flow control in natural drainage systems.

- Monitor the reduction of pollutants of concern in storm water (including, but not limited to: trash, suspended sediment, pathogen indicators, nutrients, heavy metals, and oil and grease) from five or more different types of BMPs that have been properly installed within the year preceding monitoring. Monitoring shall be continued until the effectiveness of the BMP can be determined.
- Evaluate the requirements, feasibility and cost of maintenance for each BMP.
- Develop recommendations for appropriate BMPs for the reduction of pollutants of concern in storm water in Los Angeles County.

The Principal Permittee may participate in the SMBRP's, "Performance Evaluation of Structural BMPs for Storm Water Pollution Control in the Santa Monica Bay Watershed" study to meet this requirement. Participation includes collaboration and fund contribution to cover the scope of the proposed study.

K. Standard Monitoring Provisions

All monitoring activities shall meet the following requirements:

1. Monitoring and Records [40 CFR 122.41(j)(1)]

   Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

2. Monitoring and Records [40 CFR 122.41(j)(2)] [CWC §13383(a)]

   The Principal Permittee and Permittees shall retain records of all monitoring information, including all calibration and maintenance of monitoring instrumentation; copies of all reports required by this Order, and records of all data used to complete the Report of Waste Discharge and application for this Order, for a period of at least five (5) years from the date of the sample, measurement, report, or application. This period may be extended by request of the Regional Board or USEPA at any time and shall be extended during the course of any unresolved litigation regarding this discharge.

3. Monitoring and Records [40 CFR 122.21(j)(3)]

   Records of monitoring information shall include:

   a) The date, exact place, and time of sampling or measurements;

   b) The individual(s) who performed the sampling or measurements;

   c) The date(s) analyses were performed;

   d) The individual(s) who performed the analyses;

   e) The analytical techniques or methods used; and,

   f) The results of such analyses.

4. Monitoring and Records [40 CFR 122.21(j)(4)]

   All sampling, sample preservation, and analyses must be conducted according to test procedures under 40 CFR Part 136, unless other test procedures have been specified in this Order.

5. Monitoring and Records [40 CFR 122.21(j)(5)]

   The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Order shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than four years, or both.

6. All chemical, bacteriological, and toxicity analyses shall be conducted at a laboratory certified for such analyses by an appropriate governmental regulatory agency.

7. For priority toxic pollutants that are identified in the CTR (65 *Fed. Reg.* 31682), the MLs published in Appendix 4 of the SIP shall be used for all analyses, unless otherwise specified. The MLs

from the SIP are incorporated into the Constituent List (Attachment U-1).

8. The Monitoring Report shall specify the analytical method used, the MDL and the ML for each pollutant. For the purpose of reporting compliance with numerical limitations, performance goals, and receiving water limitations, analytical data shall be reported with one of the following methods, as appropriate:

   a) An actual numerical value for sample results greater than or equal to the ML;

   b) "Not-detected (ND)" for sample results less than the laboratory's MDL with the MDL indicated for the analytical method used; or

   c) "Detected, but Not Quantified (DNQ)" if results are greater than or equal to the laboratory's MDL but less than the ML. The estimated chemical concentration of the sample shall also be reported. This is the concentration that results from the confirmed detection of the substance by the analytical method below the ML value.

9. For priority toxic pollutants, if the Principal Permittee or Permittee can demonstrate that a particular ML is not attainable, in accordance with procedures set forth in 40 CFR 136, the lowest quantifiable concentration of the lowest

calibration standard analyzed by a specific analytical procedure (assuming that all the method specified sample weights, volumes, and processing steps have been followed) may be used instead of the ML listed in Appendix 4 of the SIP. The Principal Permittee must submit documentation from the laboratory to the Regional Board Executive Officer for approval prior to raising the ML for any constituent.

10. Monitoring Reports [40 CFR 122.41(l)(4)(ii)]

    If the Principal Permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136, unless otherwise specified in the Order, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the annual Monitoring Reports.

11. Monitoring Reports [40 CFR 122.41(l)(4)(iii)]

    Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified in this Order.

12. If no flow occurred during the reporting period, the Monitoring Report shall so state.

13. The Regional Board Executive Officer or the Regional Board, consistent with 40

CFR 122.41, may approve changes to the Monitoring Program, after providing the opportunity for public comment, either:

a) By petition of the Principal Permittee or by petition of interested parties after the submittal of the annual Monitoring Report. Such petition shall be filed not later than 60 days after the Monitoring Report submittal date, or

b) As deemed necessary by the Regional Board Executive Officer following notice to the Principal Permittee.

Ordered by:

Dennis A. Dickerson
Executive Officer
Date: December 13, 2001

Changes approved by:

Jonathan Bishop
Executive Officer
Date: June 15, 2005

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL
CIVIL WEST COURTHOUSE

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LITIGATION	Lead Case No. **BS 080548** Related Cases: BS 080753, BS 080758 BS 080791, BS 080792, and 080807 Judge: Hon. Victoria Gerrard Chaney

STATEMENT OF DECISION FROM PHASE I TRIAL ON PETITIONS FOR WRIT OF MANDATE

(Filed Sep. 8, 2009)

Statement of Decision from Phase I Trial Hearing: January 7, 2005
Ruling: March 16, 2005
Department: 324-Central Civil West
Date Actions Filed: January 15 & 17, 2003

On May 19-20, 2004, trial was held on Phase I of this bifurcated action, known as *In the Matter of the Los Angeles County Municipal Stormwater Permit,* which involves five coordinated Petitions for Writ of Mandate filed by Petitioners County of Los Angeles and the Los Angeles County Flood Control District (County Petitioners); Petitioners the Cities of Arcadia,

Baldwin Park, Bell Gardens, Bellflower, Cerritos, Claremont, Commerce, Covina, Diamond Bar, Downey, Gardena, Hawaiian Gardens, Irwindale, Lawndale, Montebello, Paramount, Pico Rivera, Pomona, Rosemead, San Gabriel, Santa Fe Springs, Sierra Madre, Signal Hill, South Pasadena, Temple City, Vernon, Walnut, West Covina, Whittier, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (Arcadia Petitioners); Petitioners Cities of Monrovia, Norwalk, Rancho Palos Verdes, Artesia, Beverly Hills, Carson, La Mirada, Westlake Village, Agoura Hills, Hidden Hills, San Fernando, and San Marino (Monrovia Petitioners); Petitioner City of Alhambra (Alhambra); and Petitioners Los Angeles County Economic Development Corporation and the Cities of Industry, Lakewood, Santa Clarita and Torrance (LAEDC Petitioners) against the Regional Water Quality Control Board, Los Angeles Region (Regional Board). The Natural Resources Defense Council, Santa Monica Baykeeper, and Heal the Bay (Intervenors) intervened as Respondents in Intervention in support of the Permit.

After full briefing and oral argument, the Court, the Honorable Victoria Gerrard Chaney presiding, issues the following Statement of Decision on the Phase I issues. All parties were present and represented by counsel. Howard Gest appeared on behalf of the County Petitioners; Rufus C. Young and Amy Morgan appeared for the Alhambra and LAEDC Petitioners; Richard Montevideo and Peter Howell

appeared for the Arcadia Petitioners; John J. Harris and Evan J. McGinley appeared for the Monrovia Petitioners; Jennifer Novak and Helen Arens, Deputy Attorneys General appeared for the Regional Board; David Beckman, Anjali Jaiswal and Leslie Mintz appeared for the Intervenors. This Statement of Decision applies only to the Phase I issues presented to this Court. All remaining issues are addressed in the Phase II Statement of Decision.

Phase I of this bifurcated proceeding involved the following issues, as framed in the Joint Statement Regarding Briefing and Hearing Schedule, filed on March 2, 2004:

> 1. Petitioners' allegations that Part 2 of the Permit ("Receiving Water Limitations") is ambiguous, arbitrary, unsupported by the Record, and contrary to the "good faith" safe harbor intentions of the Respondent and renders compliance with the Permit impossible and impracticable;
>
> 2. Petitioners' allegations that the Permit exceeds the Respondent's authority under the federal Clean Water Act and California's Porter-Cologne Water Quality Act by imposing requirements that go beyond the Clean Water Act's "maximum extent practicable" ("MEP") standard and/or the Porter-Cologne Act's "reasonably achievable" standard;
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> 3. Certain Petitioners' allegations that the Permit unlawfully regulates discharges "into", as opposed to only "from", the municipal separate storm sewer system contrary to the Clean Water

Act and without authority under the Porter-Cologne Act;

4. Petitioners' allegations that Respondent acted without authority by adopting Permit terms that unlawfully direct Petitioners to modify their General Plans and/or their CEQA guidelines, and that unlawfully compel Petitioners to review development projects in a manner that is contrary to or different from the process provided for by the California Legislature, with Respondent violating the Separation of Powers doctrine under the California Constitution;

5. Certain Petitioners' allegations that the Permit unlawfully interferes with their land use authority; and

6. Petitioners' allegations that the Permit was adopted in violation of CEQA, as Respondent failed to comply with the environmental review requirements of CEQA. (To what extent was the Respondent required to comply with CEQA in adopting the Permit and did the Respondent so comply.)

Holding

With some caveats, the Court denies the petitions for writ of mandate as they relate to the Phase I issues.

To obtain a writ of mandate under Code of Civil Procedure section 1094.5, Petitioners must prove that Respondent, the Regional Board: 1) proceeded without or in excess of jurisdiction; 2) issued its Permit

without first holding a fair hearing; or 3) prejudicially abused its discretion. Abuse of discretion is established if the Respondent: a) has not proceeded in a manner required by law; b) the Permit is not supported by findings; or c) the findings are not supported by the evidence.

Petitioners failed to demonstrate that Respondent exceeded its jurisdiction.

Petitioners do not appear to argue that the Permit was issued without a fair hearing. If this argument were made, 80,000 pages of the administrative record ("the Record") and approximately 50 meetings between Regional Board staff and interested parties would confute the argument.

Neither have Petitioners demonstrated that Respondent failed to proceed in a manner required by law, that the Permit is unsupported by the findings, or that the findings are unsupported by the evidence. Therefore, the Court finds no prejudicial abuse of discretion.

Permit Part 2: Receiving Water Limitations

Petitioners assert several arguments with respect to Part 2 of the Permit, Receiving Waters Limitations. In particular, Petitioners assert that subparts 2.1, 2.2, 2.3, and 2.4 of Part 2 create ambiguity, that Part 2 must include a "safe harbor" provision, and that the Permit, including Part 2, unlawfully exceeds the MEP standard.

The Permit cannot be read in a vacuum. In interpreting the Permit the Court looks to the content of Part 2, other language and provisions in the Permit, other related statutes and regulations, and the technical and specialized nature of NPDES permits together with the expertise of those who implement them. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1696; see also *Northwest Environmental Advocates v. Portland* (9th Cir. 1995) 56 F.3d 979, 982; *United States v. Weitzenhoff* (9th Cir. 1994) 35 F.3d 1275, 1289.)

The terms of the Permit are governed by 33 U.S.C. section 1342, subdivision (p)(3)(B) of the Clean Water Act, which includes the "requirement to effectively prohibit non-stormwater discharges into the storm sewers"; the Maximum Extent Practicable standard[1]; and the separate authority of the Regional Board to require "such other provisions" necessary to meet water quality standards. The Permit is governed also by the Porter-Cologne Act section 13263, to

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[1] See Permit at 57 citing (*In the Matter of the Petitions of the Cities of Bellflower et al.* (Oct. 5, 2000) SWRCB WQ 2000-11 at 20 (R007511); see Memorandum from Elizabeth Miller Jennings, Senior Staff Counsel, SWRCB, *Definition of Maximum Extent Practicable* (Feb. 11, 1993) at 3 (R0028353); 40 C.F.R. §122.26(d)(2)(iv); *NRDC v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1375; *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1296, 1308; *Browner* 191 F.3d at 1168-67 [sic] (permitting authority's broad discretion to specify BMPs and determine whether MEP is satisfied).

the extent it is not inconsistent with federal law; and Part 2 should be interpreted in light of the findings of experts, including the Regional Board,[2] precedential orders,[3] and related Clean Water Act provisions, such as those that provide for the adoption of TMDLs.[4]

Pursuant to these authorities and guides, the Court rejects Petitioners' assertion that the MEP standard is the sole standard that applies to municipal storm water discharges and their related contention

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[2] See, e.g., Long Beach Municipal Stormwater Permit (Los Angeles RWQCB Order 99-060 at 6-7 (R0008599-600); Ventura County Municipal Stormwater Permit (Los Angeles RWQCB Order 00-108) at 9 (R0008753); Caltrans Stormwater Permit (State Board 99-06) at 10-11 (R0003225); Ltr from Alexis Strauss, Acting Director, Division of Water, EPA Region IX (Mar. 17, 1998) at 2 (R0008582); 61 Fed.Reg. 43,761 *EPA Interim Permitting Approach*; Memorandum from Michael A.M. Lauffer, Staff Counsel, SWRCB, *Legal Issues Concerning Renewal of Order 96-054* (Nov. 9, 2001) at 12 (R0007374); Memorandum from Regional Board Staff for Nov. 29, 2001 Meeting at A.9-A.10 (R0006796-97).

[3] See, e.g., *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 98-01 at 5 (R0001973) amended by *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 99-05 at 1-2 (R0001965-66) ("as a precedent decision, the following receiving water limitation language shall be included in future municipal storm water permits" without a safe harbor) (R0001965-66); *In the Matter of the Petitions of BIA,* SWRCB WQ 2001-15 at 5-7 (R0007530-32); see also *In the Matter of the Petition of Citizens for a Better Environment, et al.* SWRCB order 91-03 at 36 (R0066466).

[4] See Fact Sheet 14-15 (R0008047-48); 40 C.F.R. § 122.44(a)(1) (TMDL implementation in stormwater management plans), 40 C.F.R. § 130.6(c)(1); Cal. Water Code § 13263.

that MEP is a substantive upper limit on requirements that can be imposed to meet water quality standards. In *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159 (*Defenders of Wildlife*), the Ninth Circuit noted: "Under that discretionary provision [of Section 402(p)(3)(B)], the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the authority to require less than strict compliance with state water-quality standards." (191 F.3d at p. 1166.) The Regional Board, which is authorized to enforce the Clean Water Act pursuant to Water Code sections 13370 and 13377, can also require compliance with water quality standards. (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal. App. 4th 866 (*Building Industry Association*) [rejecting the claim that the MEP standard is the exclusive measure that may be applied to municipal storm sewer discharges].)

It seems clear that the Regional Board followed these principles when it established subparts 2.1 and 2.2 as the basic receiving water requirements for Los Angeles area waters and subparts 2.3 and 2.4 as the procedure the Board intends to implement to resolve any violations those requirements. (See *Building Industry Association, supra,* 124 Cal.App.4th at p. 890 ["Although the Permit allows the regulatory agencies to enforce the water quality standards during this process, the Water Boards have made clear in this litigation that they envision the ongoing iterative

process as the centerpiece to achieving water quality standards."]; see generally *Defenders of Wildlife, supra,* 191 F.3d 1159; *NRDC v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1375; *NRDC v. U.S. EPA* (9th Cir. 1992) 966 F.2d 1292, 1296, 1308.)

Under this process, the first step to correct water quality violations that occur, even if a permittees' SQMP has been designed to achieve standards and BMPs have been timely implemented, is set forth in subpart 2.3, the "iterative" process. Should that not be sufficient, the parties would move to subpart 2.4, Best Management Practices (BMP) requirements. The process requires cooperation from the Regional Board, State Board and local government entities and impliedly requires that all parties work together in good faith.

This reading is consistent with the requirements of the Clean Water Act generally and section 402 specifically, as well as the Porter-Cologne Act. (See 33 U.S.C. § 1342(p)(3)(B)(iii); 33 U.S.C. §§ 1341(a)(1)-(2), 1342(a)(2), 1342(p)(3)(B)(ii); 40 C.F.R. 122.4(d); Cal, Water Code §§ 13000, 13263(a).) It is also consistent with State Board orders WQ 2001-15 and WQ 99-05 and the Francine Diamond letter, found at Exhibit B to Petitioners' Request for Judicial Notice.

Reading the Receiving Waters Limitations language in this manner, there is no tension between the subparts and no ambiguity.

Petitioners assert that the Regional Board was required under the Porter-Cologne Act and CEQA to

consider certain factors when issuing the Permit, including economics, reasonably achievable water quality conditions, potential and environmental impacts, alternatives to the proposed requirements and mitigation measures for any requirements adopted. In a later section of this Statement of Decision and in the Statement of Decision from Phase II of trial the Court rejects these arguments but finds that in any event the Regional Board met any such obligations by considering these factors in addressing the MEP standard. In addition, where applicable, the Total Maximum Daily Load (TMDL) procedures allow for correction of water quality problems in a graded manner over a period of years. The TMDL procedures provide some protection from unreasonable enforcement by the Regional Board.

In sum, the Regional Board acted within its authority when it included Parts 2.1 and 2.2 in the Permit without a "safe harbor," whether or not compliance therewith requires efforts that exceed the "MEP" standard. (*Defenders of Wildlife,* supra, 191 F.3d 1159; *Building Industry Association* 124 Cal. App. 4th at p. 884.) In so concluding, the Court gives deference to State Board order 99-05, a precedential decision under Government Code section 11425.60, and notes the EPA's objection to specific safe harbor language. (See *Own Motion Review of the Petition of Environmental Health Coalition* SWRCB WQ 99-05 at 1-2 (R0001965-66); see also Letter from Alexis Strauss, Acting Director, Division of Water, EPA Region IX (Mar. 17, 1998) at 2 (R0008582).) The

Court emphasizes the importance of good faith on the part of all parties in implementing Part 2.

Maximum Extent Practicable Standard

Further, Petitioners assert that the Permit cannot go beyond the maximum extent practicable ("MEP") standard under the Clean Water Act and this Permit is inconsistent with the MEP standard. As noted, even if the Permit did exceed the MEP standard, the Regional Board was within its authority in requiring more stringent standards. However, the Court finds that the administrative record contains significant evidence showing that the terms of the Permit taken, as a whole, constitute the Regional Board's definition of MEP, including, but not limited to, the challenged Permit provisions. There is significant evidence in the administrative record that the Regional Board looked to both other states and jurisdictions, and conducted its own independent studies regarding various methods for compliance with MEP.[6]

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[6] See, e.g., Permit at 14 (development and redevelopment activities); Permit at 18 (implementation of all BMPs in SQMP); Final Fact Sheet/Staff Report (Dec. 13, 2001) ("Fact Sheet") at 15-17 (public education and participation) (R0008048-50); Fact Sheet at 19-25 (industrial/commercial program and inspections) (R0008052-58); Fact Sheet at 38-40 (public agency activity) (R0008071-73); Fact Sheet at 40-45 (development and redevelopment activity) (R0008073-78); Long Beach Municipal Stormwater Permit (Los Angeles RWQCB Order 99-060 (R0008599-600); Ventura County Municipal Stormwater Permit (Los Angeles RWQCB Order 00-108) (R0008753); Caltrans Stormwater Permit (State Board 99-06) at 10-11

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This Court specifically finds that the Regional Board conducted considerable research and review to ensure that the best management practices ("BMPs") were available and reasonable.[6] For example, the administrative record

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(R0003225).Comparison of Permit with Orange County and Santa Clara Permit (R0031402); Orange County Permit Proposed Monitoring Program (R0054938); Riverside Permit (R0055287-88); Denver Urban Stormwater Drainage Manual (R0056744-46); San Francisco BMPs (R0057414); Watershed Ordinance for Austin, TX (R0058074); Orange County DAMP (R0058399); San Bernardino Permit (R0061460); Ventura Permit (R0061493); Fresno Permit (R0061511); Sacramento Permit (R0061585); San Francisco Bay Area Permit (R0061636); Santa Cruz Region Permit (R0061652); Sarasota Permit (R0061666); Tulsa Permit (R0061773); Anchorage Permit (R0061805) (New York State Stormwater Management Design Manual (R0009514); Virginia Stormwater Management Manual (R0009529).

[6] See, e.g., Allison, Robin, Effectiveness of Two Storm Water Trash Trapping Systems (R0068962-63); Leecaster, Molly K., Assessment of Efficient Sampling Designs for Urban Stormwater Monitoring (R0022854-60); Radulescu, Dan, Storm Water Quality Task Force BMP Guide for Retail Gasoline Outlets (Nov. 2001) (R0007546-50); Radulescu, Dan, Retail Gasoline Outlets: New Development Design Standards for Mitigation of Storm Water Impacts (Dec. 2001) (R0007598-607); Dallman, Suzanne, Storm Water: Asset not Liability (Dec. 3, 1999) (R0068878-913); Pitt, Robert, Illicit Discharge Detection and Elimination (May 2001) (R0011273); Swamikannu, Xavier, SUSMPs Presentation to the Regional Board (Jan. 26, 2000) (R0068726-40); Othmer, Edward F., Performance Evaluation of Structural BMPs: Drain Inlet Inserts (R0007566-78); Los Angeles County Requirements, Section Three (R0068875-77); Schueler, Thomas, R., Better Site Design: Changing Development Rules to Protect the Environment (1999) (R0068693-95); A Guide to Better Site Planning (R0068868-73); Urban Runoff: New Development Management Measure (R0068713-22); Ferguson, Bruce K., Stormwater

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contains *The Fundamentals of Urban Runoff Management: Technical and Institutional Issues,* which demonstrated an effective and available method for removing pollutants. (Horner, R., *Fundamentals of Urban Runoff Management: Technical and Institutional Issues* (Aug. 1994) (R0068930).) The administrative record also shows that the Regional Board considered State Board order 2000-11, which held that the Standard Urban Stormwater Mitigation Plans ("SUSMPs") "are consistent with MEP and therefore are federally mandated." (*In Re Cities of Bellflower, et al.* (2000) SWRCB Order 2000-11 (R0007506).) Additional challenges to the SUSMPs are rejected in the Statement of Decision from Phase II of trial in deciding Issue 6.

The Court finds that there was no issue of impossibility. The administrative record demonstrates that there are (1) BMPs available to meet the terms of the Permit consistent with the MEP standard, and (2) that those BMPs are reasonable. The administrative record supports the conclusion that the research and review were conducted by the Respondent.[7]

This Court finds based on the administrative record that the Regional Board made considerable

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Infiltration (R0068914-15); Horner, Richard R., Fundamentals of Urban Runoff Management: Technical and Institutional Issues (Aug. 1994) (R0068930-61); Ltr from NRDC to Regional Board re: SUSMPs (Jan. 14, 2000) (R0068840-61).

[7] See *supra* notes 7 and 8; see also Addendum (consideration of EPA documents).

findings regarding (1) the positive effects of storm water management and (2) the cost of potential programs and BMPs. (See e.g. Permit at 2-4, 8-10, 12-14; Fact Sheet at 3-7 (R0008036-40).) The Regional Board considered the history of implementation costs, both in prior permits for Petitioners and costs in other states.[8]

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[8] See, e.g., Yamaguchi, Marianne, *Comparative Cost of the LA County Storm Water Management Program* (June 10, 1996) (R0031426-30; R0031431-44); Regional Board, Slide Presentation of MS4 Permit (Dec. 13, 2001) (R0007660); SUSMPs, *BMP Cost Estimates* (Nov. 30, 1999) (R0068731-33); Santa Monica Bay Tourism and Recreational Beach Use (1994) (R0031447); Los Angeles 1998 Economic and Demographic Info. (1998) (R0010984-85); Permit Costs, City of Manhattan Beach (June 17, 1996) (R0031445); U.S. EPA, *Economic Benefits of Runoff Controls* (Sept. 1995) (R0010711-12); U.S. EPA, *Data Summary of Urban Stormwater Best Management Practices* (Aug. 1999) (R0010735-36); *Cost and Benefits of Storm Water BMPs* (Sept. 14, 1998) (R0073087-135); U.S. EPA, *Economic Analysis of the Storm Water Phase II Rule* (Aug. 1, 1997) (R0010281-82); U.S. EPA, *Liquid Assets: A Summertime Perspective on the Importance of Clean Water to the Nation's Economy* (May 1996) (R0066961); The Role of Metropolitan Areas in the National Economy (R0011017); *The Benefits of Better Site Design in Commercial Development* (R0011499-508); Billingsley, Janice, *Study Nails Building Costs* (Sept. 4, 2000) (R0010703); U.S. Dept. of Commerce, *Economic Valuation of Natural Resources: A Handbook for Coastal Resource Policymakers* (June 1995) (R0042398); Griffin, Adrian, *Economic Issues in Water Quality Regulation* (R0010706-07); U.S. Conference of Mayors, *U.S. Metro Economies: The Engines of America's Growth* (July 2001) (R0010916, R0010918); Washington State Dept. of Transport. and Ecology, *Cost Analysis, Washington Dept. of Ecology Year 2001* (Aug. 30, 2001) (R0010780); Virginia Dept. of Conservation and Recreation, *The Economic Benefits of Protecting Virginia's*

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CEQA Compliance

Several Petitioners assert that the Court should invalidate the action of the Regional Board on the grounds that the Regional Board failed to comply with the California Environmental Quality Act (CEQA), and failed to conduct the necessary environmental review required by CEQA. They acknowledge that in issuing a National Pollutant Discharge Elimination System (NPDES) permit, the Regional Board is exempt from complying with CEQA's requirement to prepare Environmental Impact Reports or negative declarations. (See Wat. Code, § 13389; Cal. Code of Regs., Title 14, § 15263; *Committee for a Progressive Gilroy v. State Water Resources Control Board* (1987) 192 Cal.App.3d 847, 862.) Petitioners allege that the Regional Board was to comply with the "policy" requirements of CEQA, pointing to Public Resources Code sections 21000 and 21001.

The Court rejects the argument that the Regional Board violated CEQA. The Court agrees with the Regional Board that the issuance of the subject Permit was exempt from all aspects of CEQA. The Court acknowledges the State Board's finding that complying with CEQA's "policy" provisions means that in adopting the Permit, the Regional Board should consider any environmental reports or similar

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Streams, Lakes, and Wetlands (Oct. 2001) (R0010880-85; R0010909-11).

documents submitted during the adoption process. (See State Board Orders WQ 75-8 & 84-7, attached to Petitioners' Request for Judicial Notice as Exhibits D & E.) This interpretation of CEQA is consistent with the Legislature's stated intent that the environmental review documents contain the discussion of any adverse environmental impacts, alternatives, mitigation possibilities, etc. (Pub. Resources Code, §§ 21002.1, 21003.1; cf. Cal. Code of Regs., title 14, § 15063.) CEQA requires public agencies to generate sufficiently informative documents so that decisions are made with full consideration of the environmental consequences. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) This makes the environmental impact report the "heart" of CEQA, *(Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229 [citation omitted]). Petitioners' arguments cannot be accepted because they would render the Regional Board's exemption from this requirement illusory. Petitioners have not argued that the Regional Board failed to consider existing environmental documents as provided in State Board orders 75-8 and 84-7. The Court finds that the Regional Board had before it and considered the necessary information concerning the environment.

In addition, having found the Permit is consistent with the Clean Water Act with respect to the MEP standard and other Phase I issues, the Court respectfully disagrees with Petitioners' contention that the Permit goes "far beyond" the Clean Water

Act's mandates. Also, a finding that the Permit's adoption was not bound by these CEQA reporting requirements is consistent with Congress' intent to streamline environmental regulation. (See 33 U.S.C. § 1371, subd. (c); *Pacific Legal Foundation v. Quarles* (C.D. Cal. 1977) 440 F.Supp 316, 320-21 & fn. 2.) Under the Porter-Cologne Act, a California-issued NPDES permit must be consistent with federal law and intent. (See Wat. Code, §§ 13370, 13372; *Pacific Water Conditioning v. City Council of Riverside* (1977) 73 Cal.App.3d 546, 556.)

The Court therefore finds that in adopting the Permit, the Regional Board did not act in a manner that was contrary to law, outside the scope of its authority or without the support of the weight of evidence in the record with respect to Petitioners' CEQA violation claim.

CEQA Amendment Claim

Turning next to Petitioners' claim that the Permit violates the separation of powers and unlawfully "amends" the CEQA process, the Court finds that Petitioners have not met their burden under section 1094.5. Petitioners' argument rests on the belief that CEQA occupies the field of environmental review. Petitioners present no authority to demonstrate this alleged legislative intent.

Public Resources Code section 21003 demonstrates that the Legislature intended CEQA to be *an* environmental review process, not the *only* one. When

more than one review occurs, these should be coordinated as much as possible. The plain language of this statute supports this reading. Given the powers vested in the Regional Board to implement water quality control and coordination under the Porter-Cologne Act, the Regional Board can require additional environmental reviews consistent with this authority and it can specify and require actions to ameliorate the impacts of polluted runoff without offending CEQA. (See, e.g., Pub. Resources Code, § 21174; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.)

The Court also finds that the equitable doctrines of estoppel, laches and waiver apply here. When applying for their 1996 permit, the permittees advised the Regional Board that much of their storm water consideration could be "channeled" through the compliance effort of CEQA (R0060482.) They proposed coordination with their existing CEQA processes, finding that the CEQA checklist to assess initial studies could also indirectly address potential impacts to storm water, with additions to the form. (R0060482, 0060555, 0060629.) The 1996 permit therefore included a requirement that permittees amend their CEQA review process to include storm water considerations. (R0008514.) Indeed, it imposed a deadline of 1998 to develop CEQA guidelines and 1999 to incorporate them into the permittees' internal procedures. (R008514, R008510.)

Yet none of these Petitioners availed themselves of the right to challenge this provision to the State

Board under Porter-Cologne Act section 13320. At argument, Petitioners represented that they complied with the 1996 permit's requirements. In addition, when applying for the subject Permit, they proposed that this provision be added to the Permit. (R0000032.) This conduct is inconsistent with their current position. The equitable doctrines of waiver, laches and estoppel can apply to municipalities. (See, e.g., *City of Los Angeles v. County of Los Angeles* (1937) 9 Cal.2d 624, 628, 630; *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 820.) The Court is satisfied under these facts that those doctrines apply here to bar Petitioners' claims on this issue.

General Plan Amendment Claim

Along a similar vein, Petitioners argue that the Permit, specifically the sections on new development and redevelopment and General Plans, constitutes land use planning, infringing upon the municipalities' land use authority. The Court respectfully disagrees with the Alhambra and LAEDC Petitioners and follows *California Coastal Commission v. Granite Rock* (1987) 480 U.S. 572 [107 S.Ct. 1419] holding that an environmental regulation is not a land use regulation. The Court finds that these are environmental regulations that do not dictate the manner in which the permittees are to use the land. Instead, while there may be some limitations, this court finds these sections represent environmental regulations, not land use regulations. These regulations are clearly for the greater good. The Permit itself notes

that the Regional Board did not intend the Permit to restrict or control local land use decision-making authority, but contemplated that while permittees exercised that authority, they fulfilled Clean Water Act requirements to reduce the discharge of pollutants from new development and redevelopment activities. (Permit, at p. 14.)

In addition, the cases which Petitioners cite regarding land use planning stand for the general proposition that land use planning falls within the authority of local governments and agencies. Yet even then, land use planning must be consistent with general laws. The California Constitution Article 11 section 7 states that a county or city may not enact laws that conflict with general laws. This position is further supported by the case of *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 532 for matters of statewide concern. The Porter-Cologne Act contains the Legislature's finding that water quality is a matter of statewide concern, requiring a statewide program administered at a regional level. (See, e.g., Wat. Code, § 13000; see also generally *Southern California Edison v. State Water Resources Control Board* (1981) 116 Cal.App.3d 751, 758.) 33 U.S.C. section 1251 has a companion policy statement in the Clean Water Act, where Congress found that water quality is a matter of federal concern.

In this connection, the Court disagrees with the Arcadia Petitioners that the Regional Board cannot act on behalf of the State Board. The Porter-Cologne Act sections 13001 and 13225 clearly authorize a

regional board to act on behalf of the State Board. Additionally, it makes more sense to allow a regional board to act on behalf of the State Board because a regional board would be more aware of the specific problems in its area/region of the state as compared to the State Board. If permittees and other interested parties had to deal with one large board, as opposed to larger regional boards, then there would not necessarily be specialists in the particular problems of that region, such as clay soil, mountains or other unique features not occurring in different regions. (*e.g.* Northern California, the farming communities, Central California, and Los Angeles County metropolis are unique.) Allowing regional boards provides greater efficiency by processing the permits more expeditiously by specialists in specific areas.

Porter-Cologne Act section 13001 gives the Water Board primary responsibility to control and coordinate water quality, with a broad grant of authority. However, Porter-Cologne Act section 13225 empowers the Regional Board with regional duties and obligations to prevent and abate problems and set water policies which deal with water pollution and nuisances. Porter-Cologne Act section 13240 allows for the adoption of plans by the Regional Board, which clearly gives the Regional Board authority to act in this instance, and Porter-Cologne Act section 13002 gives the Regional Board authority over local government entities.

The Court also finds that the equitable doctrines of waiver, laches and estoppel do apply to bar Petitioners' land use allegations. This finding is based on Petitioners' own actions and proposals, as well as the 1996 permit. As early as 1995, the permittees submitted an application for the 1996 permit in which they indicated that their General Plans were the legal "backbone" for the planning process and all development approvals must be consistent with the policies, objectives and principles set forth in the General Plan. They further offered: "Discussion of stormwater issues in the General Plan could greatly enhance the awareness of the issues and encourage full assessment of possible adverse impacts on stormwater quality as the result of new and redevelopment." (R0060556.) The 1996 permit, at section 3(b) included a requirement that each permittee include watershed and storm water management considerations whenever the relevant portions of its General Plan were amended. (R0008514.) None of the parties before the Court today challenged, either administratively or judicially, this requirement in the 1996 permit.

Petitioners argue that they were not required to challenge this provision in the 1996 permit but were entitled to simply tolerate it. However, as with the CEQA arguments, their current position regarding land use are [sic] contradicted by the fact that when applying for the current permit, they specifically requested inclusion of this provision. In their proposed permit, they included a requirement similar to the one found in the 1996 permit and virtually identical

to the one that the Regional Board eventually included in the challenged Permit. (See R00000032, Permit at p. 41.) Respondent and Intervenors have noted that prior permits and the permittees' application for a permit serve as the basis for drafting and adopting a subsequent permit. In drafting and adopting the subject Permit, the Regional Board considered and relied upon programs implemented and proposed by the permittees. This series of events and actions satisfy the Court that the equitable doctrines of waiver, estoppel and laches apply.

Discharges "Into" and "From" the Storm Drain System

The Court denies the petitions for writ of mandate with respect to the "into" versus "from" argument. First, Respondent and Intervenors have demonstrated that the Clean Water Act itself uses the words "in" or "into," not just "from." (See, e.g., 33 U.S.C. § 1342(p)(3)(B)(ii); 40 C.F.R. § 122.26(d)(1)(ii), 122.26(d)(1)(v)(B), 122.26(d)(2)(iv)(D), 122(d)(2)(iv)(B); 122.26(d)(1)(v), 122.26(d)(2)(iv)(A)(6), 122.26(d)(2)(iv)(A), 122.26(d)(2)(iv)(A)(2).)

Second, the Clean Water Act section 402(p)(3)(B)(ii) prohibits the discharge of non-stormwater "into" storm sewers. (33 U.S.C. 1342(p)(3)(B)(ii).) The administrative record also contains an admission by Petitioners that "the most effective way of dealing with stormwater runoff is to deal with it at the source before it becomes a

problem" – before it goes into the system. (Ltr from Executive Advisory Committee (Aug. 6, 2001) (R0004878).) In addition, State Board 2001-15, discuses [sic] the "into" versus "from" issue, stating, "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control." (*In re Building Industry Association of San Diego County, et al.* (2001) SWRCB Order 2001-15 at 10 (R0007535).)

Third, although this Court recognizes that it may not always be possible to prevent something from going into the system, it probably is the cheapest method. If something does not go in, then there is no concern about it coming out the other end. If the contaminant does not enter the system, there is no need to process it at the end of the system. If the system is overloaded at the final point by flood, for example, there are less toxic materials which could then enter the general water system.

Fourth, the Court does not look at the word "in" in quite as restrictive a manner as the Arcadia and Monrovia Petitioners. The Arcadia and Monrovia Petitioners argued that the word "in" only relates to the point of origin, and that this limits petitioner's ability to set regional controls. However, what constitutes "in" depends on at what point one looks at the storm drain system. Analogizing the storm drain system to a tree, any of the junctures between one little leaf, the first little branch, twig, or a slightly larger branch, could be either from or into a regional control or "from" that and "into" the larger system.

The Court finds that the Permit's regulation of what goes "into" the storm drain does not take away from the Petitioners' rights and needs to control the process.

Finally, by regulating discharges into the storm drain system, Petitioners have the opportunity to try to deal with it at the source of the contamination, like the car wash example mentioned by the County Petitioners. It would allow Petitioners to review the car wash's activities and stop the point of the contamination, while still permitting Petitioners to deal with the regions. Petitioners could potentially control an area of five square miles at the source and also operate a larger detention basin or treatment facility, as the Arcadia Petitioners referred to as a regional approach. Regulating discharges "into" the storm drain system does not take away from the regional approach as argued by the Arcadia Petitioners. Thus, this Court resolves this issue in favor of the Regional Board and Intervenors.

IT IS SO ORDERED.

Dated: March ~~16~~, 24 2005

/s/ Victoria Chaney
VICTORIA GERRARD CHANEY
JUDGE OF THE
SUPERIOR COURT

Addendum

Examples of Regional Board Consideration of US EPA Documents

US EPA, *Draft Data Summary for the Construction and Development Industry* (Feb. 2001) (R0020445)

US EPA, *Estuarine and Coastal Marine Waters: Bioassessment and Biocriteria Technical Guidance* (Dec. 2000) (R0022664)

US EPA, *National Conference on Tools for Urban Water Resource Management & Protection* – Proceedings, Chicago, IL. Feb. 7-10, 2000 (July 2000) (R0019356)

US EPA, *Storm Water Phase II Compliance Assistance Guide* (March 2000) (R0010593)

US EPA, *Report to Congress on the Phase II Storm Water Regulations* (Oct. 1999) (R0010418)

US EPA, *Storm Water O&M Fact Sheet: Catch Basin Cleaning* (September 1999) (R0022652)

US EPA, *Storm Water Technology Fact Sheet: Sand Filters* (Sept. 1999) (R0022645)

US EPA, *Storm Water Technology Fact Sheet: Water Quality Inlets* (Sept. 1999) (R0022639)

US EPA, *Storm Water Management Fact Sheet: Record Keeping* (Sept. 1999) (R0017615)

US EPA, *Storm Water Management Fact Sheet: Coverings* (Sept. 1999) (R0017612)

US EPA, *Preliminary Data Summary of Urban Storm Water Best Management Practices* (Aug. 1999) (R0017609)

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US EPA, *Economic Analysis of the Storm Water Phase II Proposed Rule: Initial Final Draft,* (Aug. 1, 1997) (R0010281)

US EPA, Seminar Publication: *National Conference on Environmental Problem-Solving with Geographic Information Systems,* Cincinnati, Ohio. Sept. 21-23, 1994 (September 1995) (R0021617)

US EPA, *Economic Benefits of Runoff Controls* (Sept. 1995) (R0010711)

US EPA, Seminar Publication: *National Conference on Urban Runoff Management: Enhancing Urban Watershed Management at the Local, County, and State Level* – March 30-April 2, 1993 – Chicago, IL. (April 1995) (R0015620)

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US EPA, *Storm Water Discharges Potentially Addressed By Phase II of the National Pollutant Discharge Elimination System Storm Water*

Program – Report to Congress, (March 1995) (R0015026)

US EPA, *Changing the Course of California's Water* (1995) (R0033798)

US EPA, *NPDES Compliance Inspection Manual* (Sept. 1994) (R0014466)

US EPA, *A State and Local Government Guide to Environmental Program Funding Alternatives* (Jan. 1994) (R0038104)

US EPA, *Guidance Manual for Implementing Municipal Storm Water Management Programs* – Chapters 1-4 (Aug. 17, 1994) (R0013925)

US EPA, Pitt, Robert, Clark, Shirley, and Parmer, Keith, *Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration* (May 1994) (R0022959)

US EPA, *Overview of the Storm Water Program* (Oct. 1993) (R0010064-66)

US EPA, Handbook – *Urban Runoff Pollution Prevention and Control Planning* (September 1993) (R0009753-54)

US EPA, NPDES Storm Water Program: Question and Answer Document, Volume II (July 1993) (R0008386-87)

US EPA, *Coastal Nonpoint Pollution Control Program – Program Development and Approval Guidance* (Jan. 1993) (R0039770); US EPA, *Investigation of Inappropriate Pollutant Entries into Storm Drainage Systems – A User's Guide* (Jan. 1993) (R0022861)

US EPA, *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* (Nov. 1992) (R0009927, R0009930-33)

US EPA, *Report on The EPA Storm Water Management Program* (Oct. 1992) (R0009871, 73)

US EPA, *Storm Water Management for Industrial Activities – Developing Pollution Prevention Plans and Best Management Practice* (Sept. 1992) (R0043866)

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US EPA, *Remedial Action, Treatment, and Disposal of Hazardous Waste* – Proceedings of the Sixteenth Annual RREL Hazardous Waste Research Symposium (August 1990) (R0042527)

US EPA, *Contributions of Urban Roadway Usage to Water Pollution* (March 1975) (R0027336)

US EPA, *Urban Runoff Management Information/ Education Products* (R0036525)

Federal Register, Part II EPA – *Final Reissuance of National Pollutant Discharge Elimination*

System (NPDES) Storm Water Multi-Sector General Permit for Industrial Activities; Notice (October 30, 2000) (R0019785)

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Federal Register – Part XIV EPA – *Final National Pollutant Discharge Elimination System Storm Water Multi-Sector General Permit for Industrial Activities*; Notice (Sept. 29, 1995) (R0016080)

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US EPA, *NPDES Program Implementation Review,* California Regional Water Quality Control Board 4, Los Angeles Region (Oct. 1999) (R0018019)

Letter from Alexis Strauss, USEPA Region IX, to Walt Pettit, Executive Director, California State Water Resources Control Board, (Mar. 17, 1998) (R0008581)

Comparison of Los Angeles County Draft Storm Water Permit with Similar Permits in Orange and Santa Clara Counties; EPA Region 9 (June 10, 1996) (R0031402)

Memorandum from Eugene Bromley, EPA Region 9, to Maryann Jones, Storm Water Section, California State Water Resources Control Board, re: Role of Municipalities in Implementation of State General NPDES Permits for Storm Water Associated with Industrial Activity (Dec. 1993) (R0008388)

Memorandum from E. Donald Elliott, USEPA, to Nancy J. Marvel, US EPA Region IX, re: Compliance with Water Quality Standards in NPDES Permits Issued to Municipal Separate Storm Sewer Systems (Jan. 9, 1991) (R0008378)

US EPA, EPA Industry Sector Notebooks on Various Industries, totaling 34 Sector Notebooks, ((R0074054); (R0074257); (R0074442); (R0076608); (R0078502); (R0074609); (R0074743); (R0075090);

(R0075259); (R0075769); (R0077054); (R0077213); (R0077805); (R0078059); (R0078280); (R0078820); (R0074847); (R0074938); (R0075397); (R0075526); (R0075641); (R0075930); (R0076085); (R0076222); (R0076369); (R0076508); (R0076775); (R0076909); (R0077411); (R0077524); (R0077661); (R0077944); (R0078209); (R0078378))

No. 11-460

RECORD AND BRIEFS

In The

OFFICE OF THE CLERK

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX
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CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER, Plaintiffs, vs. COUNTY OF LOS ANGELES, et al., Defendants.	No. CV 08-01467 AHM (PLAx)

VOLUME II

Deposition of MARK PESTRELLA, taken on behalf of the Plaintiffs, at 1314 2nd Street, Santa Monica, California, commencing at 9:01 a.m., on June 2, 2009, before Evelyn Mah, CSR No. 4231, RPR.

(Filed Sep. 8, 2009)

* * *

[207] **85 cities, within the District's jurisdictional boundaries – I don't mean jurisdictional in terms of control of land use, where it is geographically. Generally speaking, does stormwater within those cities drain into the Flood Control District system?**

A It's a combined system, so you're describing it almost like it's an isolated system, and it drains through many – in many different ways, uncontrolled, and eventually ending up into – potentially into a system to control that drainage, whether it's the L.A. County Flood Control District's system or the City's system or if it's a natural drainage course that runs to the ocean. There's a number of conveyances of those flows through the greater Los Angeles Basin and ultimately into their outlet points.

Q Do each of those cities within the District, those 85 cities, do they contain their own MS4 systems?

A I don't know if each of them do, but certainly a majority of them do.

Q And how would you refer to those systems?

A Storm drain systems within a city.

Q Okay. Do those systems connect to the Flood Control District MS4?

A Not necessarily.

Q Do some of them?

[208] A Yes.

Q Do you know which ones do?

A Yes.

Q Okay. Where is that information located?

A Well, L.A. County Public Works, and then within L.A. County Public Works, there are a number of entities holding that information, whether it's our Flood Maintenance Division or Water Resource Division. Watershed Management Division would have that information.

Q How many of those systems within a city – storm drain systems within a city would you say connect to the District's MS4 system?

A It's so varied. I couldn't give you an answer to it.

Q What about order of magnitude?

A It's dependent upon the city and its situation within a – the watershed that exists. And it's varied – it varies.

Q So you said that some of them do, and that information was within the Department of Public Works; is that right?

A Yes.

Q But you don't know between – whether it's 1 or 85?

[209] A Right.

Q Okay. Is – we have been talking about the District MS4. When you were referring to

that, are you intending it to be distinct from the County of Los Angeles MS4?

A Yes.

Q How so?

A There are two separate systems.

Q And how would you describe the County's MS4?

A Similar to a city storm drain system. The unincorporated counties similarly drain by system of drains. Could be a combination of Flood Control District drains or other maintaining body drain in the unincorporated area.

Q And how big is that infrastructure, would you say?

A Similar to what I described for an individual city.

Q How so?

A In that it's varied and interconnected, and it's varied in its size, type. Standards are different. So it's just – the two – a city is not beholden to Flood Control District standards with respect to its drainage system or its storm drain system in its design. Even building standards for private lots have – could [210] be different for the drainage off a private lot. So they could have different size system, materials.

So – but when we are talking about – you asked about order of magnitude. It is, again, varied in that the unincorporated county is a hodgepodge of islands of unincorporated areas that all have different communities and are in different watersheds, and so I can't characterize in general for you what an unincorporated county system is because it's different – it's varied in each situation, dependent on where it's located.

Q My question might have been confusing. I didn't mean the physical size of the infrastructure. I meant, roughly speaking, something like, how many miles of storm drains, for example, would you say?

A I just don't know. There's 125 unincorporated communities, and there's 1.5 million people living in those communities. It's – I just don't know.

Q Does –

A I don't catalog that.

Q I'm sorry?

A I don't catalog that, so I don't have an order of magnitude for you.

Q When you say you don't know, because you're testifying on behalf of the County, you're saying the [211] **County doesn't know?**

A The County does not know or have a way to tell you the exact miles or lineage of storm drain within its unincorporated communities. There are

maintaining bodies in those communities that might be able to tell you what they maintain, but it's going to be interconnected as is described here.

Q And is the same true for your earlier testimony about the District? Is it true that the District does not know how many of the 85 cities within the District have a storm drain system that connects to the District's system?

A We know what is connected to our system. That connection could be – go through several cities. It could be one city. We know we could define whether a city's drain that is being maintained by them is connected to our system, but I don't know that number off the top of my head for you, how many of them are actually connected that way.

Q I'm sorry. Could you explain what you mean by that? You said you could say whether a specific drain is connected to the District's storm drain system?

A Yes.

Q Okay. But you couldn't say what? I'm sorry.

A I can't tell you how many cities are connected [212] to that drain beyond what's connected to our system. So that branch of a storm drain system may drain one city, two. We don't do it by city again. We do that by hydrologic areas. City may build a drain and have another entity connect to their drainage system and keep going upstream so that's why it's varied.

Q When you say you couldn't tell me how many cities may be connecting to the District's system through a particular connection, do you mean to say the District doesn't know that information?

A I couldn't tell you sitting here today. I could look at a map. It could be done, and we can figure out how many entities are connected. If they are connected to our system and – then a permit is required, so we know about that connection. Then the branch system beyond that, at least at the time that they connect, we have an understanding of what was being connected. What's connected beyond that is – could be done with or without permit by city. It's – it gets – it becomes spaghetti.

Q That final step then, the spaghetti, that's something that the District doesn't know?

A No, not necessarily.

Q The District does know?

A We may know at the time that they connect, but [213] we may not know beyond that – that time, yeah.

Q When you say you could look at a map and tell me, were you referring to a particular map or a particular database or set of – what were you referring?

A I think, in general, I can look at data from different sources and tell you that. There is a source

in our department in terms of the drains that we own and operate and what's connected to them. And we do investigate our drains in a six-year cycle, so we know who is connected to them and what permits are pulled to actually make the connection.

Q What's that source within your department?

A Flood Maintenance Division is probably the best place to start.

Q When you said "source," were you referring just to that division or were you referring to a particular collection of data?

A There's a collection of data, and it may be stored in different locations, but they rely on a storm drain book, a book of drains, that they use – open up on their maintenance routines and know what we maintain and what we don't maintain and what we own and don't own.

Q What's that storm drain book?

[214] A I don't know – I don't know what they call the name of that book. I used to call it a zebra book, but I don't know what they call it anymore.

Q It's not the same as the Thomas Guide?

A We have a modified Thomas Guide that shows L.A. County Flood Control District drains, and that is a reference guide, but there is also a more detailed cut sheet that shows actual – you know, down to specific quadrant size of drain system, and

that's their – their storm drain book, and Flood Maintenance Division is the place for you to get that information.

Q Is the zebra book or what used to be called the zebra book different than the modified Thomas Guide?

A It is the – it is what I would refer to as the book of storm drains. That's one and the same.

Q Oh, it's the same thing?

A Yeah. The Thomas Guide reference is only for reference to get you into where you're at to get a general idea of what we own and operate. To get down to the nitty-gritty, this drain at this level and this block with this connection, then you need to look at the department's book of drains there. And even that term may be wrong, but they have maps down to quadrant, you know. You could see at street level what the connections are and what we own and operate.

[215] **Q And that book of drains where you can see street level connections is different from the Thomas Guide; is that correct?**

A Yes. Uh-hum.

Q Okay. Does the District MS4 drain unincorporated County land?

A Yes. On some occasions, yes, it does.

Q And does the District MS4 drain cities within the County?

A It drains land within the County that are incorporated, yes.

Q What's the extent of the interconnection between storm drain systems within cities and the District's MS4? Can you characterize it?

MR. GEST: Objection. Vague and ambiguous. What do you mean by "the extent of the connection"?

Q BY MR COLANGELO: Did that question make sense?

A I was going to ask you what you mean by "extent."

Q Sorry. It was a bad question.

Would you characterize this collective storm drain system within the County of Los Angeles as interconnected?

A Yes.

[216] **Q In what way?**

A Well, physically, there are connections, and then the purpose of the storm drain system, whether connected to each other or not, is to drain a piece of property or land area, so they are connected further in their purpose, but physically there isn't a connection between the system.

Q Do you know how many other MS4s or other city storm drain systems connect to the District's?

MR. GEST: Objection. Asked and answered.

THE DEPONENT: Yes, I did answer that. I have a clarifying question, though, of you.

Q BY MR COLANGELO: Sure.

A You keep saying "MS4" and "storm drain system," and I'm wondering about your definition of the two.

Q Let me ask you your definition of the two. I have been using them interchangeably. If that's incorrect, let me know.

A The MS4 system is a regulatory term. When I think of MS4 system, I think of it as a qualifier for requirement to have a permit –

Q Okay.

A – an NPDES permit.

Storm drain system, you may have a storm drain system that serves less than 100,000 people and wouldn't [217] necessarily require a permit.

Q So what do you think is the better term to use today? Would you say storm drain system when I'm not talking about the District's MS4?

A When we are talking about regulatory compliance, then I would talk about the MS4 system. If

we are talking about a drainage system, storm drain would be the right term to use.

Q Right now, I'm trying to characterize the storm drain system within the County or – I'm sorry – ask you for your characterization of the storm drain system within the County of Los Angeles.

A Okay.

Q Why don't I use storm drain system for now instead of MS4.

A Okay.

Q Okay. So let's go back to that question because I don't know the answer to this question. Does the District know how many other storm drain systems not owned or operated by the District connect to the District's storm drain system?

A We know who's connected to our system. The extent of a – to connect to our system, it would be a storm drain system connected. So I know the number of connections, so, therefore, I know the number of [218] associated storm drains, but I do not know the extent of that storm drain system beyond that.

Q What is the number of those connections?

A I don't have that here.

Q You said you know the number of those connections.

A I know – I can develop that number for you. We have that number available.

Q Within an order of magnitude.

A Hundreds of thousands.

Q Okay. Of connections from other storm drain systems that the District does not own or operate that connect to the District's?

A Correct. Systems that connect, yes.

Q Are you familiar with the County of Los Angeles storm drain geodatabase?

A Yes.

Q What is it?

A It's a database that we're doing QA/QC on to better identify the storm drain systems throughout the County of Los Angeles, not only Flood Control District, but other systems maintained by the cities of – in Los Angeles.

Q What does it contain? What information does it contain?

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[295] honest with you.

Q Say that again.

A We don't know that we would go after trend. It may not help us with – help the Regional Board with management decisions regarding pollutants of concern.

Q Okay. You think that's an unhelpful area of inquiry?

A Yes.

Q Why?

A It's almost intangible with respect to the tools we have right now to measure chemically the trend and what it's saying about the water quality.

Q Okay. I think there were two parts to your earlier question, the one I had read back. One was the District, as I understood you to be saying, has suggested something to answer the question of what the trends are, and the second part was that, in your view, that is not something that necessarily you would go after. Is that right?

A Yes. But I'm not in charge of this permit.

Q I understand that, but I'm asking about your testimony today on behalf of the District. And the first part of your question – I'm sorry. The first part of your answer was that the District has suggested to the Board something to do, a monitoring program, to [296] **assess trends. Did I understand that right?**

A I think we have, and you probably have something where we made that statement, so we can look at that. I mean, you're talking to me today, in the past, have we made suggestions about trend analysis? I'm sure we have. We could go look at that and be more factual.

Q I thought – I thought in your testimony you were referring to something in particular, and I am asking you what you were referring to.

A I recall us making a comment about trend, but I don't have it in front of me, so I can't remember what that comment was.

Q So you are not aware of any particular proposal you made with respect to a better way than mass emissions monitoring to estimate trend?

A Correct.

Q Okay. Now, the third bullet under T-6 says, "Determine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to applicable standards in the Basin Plan, the Ocean Plan, or the CTR, and with emissions from other dischargers."

Do you see that?

A Yes.

Q In the District's view, does the mass emissions [297] monitoring accomplish that objective?

A Exceedances of water quality standards at that point, yes.

Q Okay. So are you saying that it – the mass emissions monitoring determines only whether water quality standards at that point where the monitoring is conducted are exceeded?

A Yes.

Q Okay. In the District's view, the monitoring does not determine one way or the other if the MS4 is contributing to those exceedances?

A MS4 definition, again, if we are talking about drains, I don't believe that a drain actually contributes to water quality exceedance. It is those areas discharging to the drain system that may be causing an exceedance.

Q Okay. So in your view, if we are talking about the drains as just the conveyance, in your view, could the conveyance ever be contributing to exceedances of water quality standards?

A The conveyance? That's vague.

Q What is vague about it?

A What's the – it's a verb there. Conveying something.

Q Well, conveying stormwater or non-stormwater [298] **runoff. Isn't that what the Flood Control District MS4 does in part?**

A We don't – I don't believe the storm drain system actually contributes to a water quality exceedance because its purpose in what it's doing is conveying flows.

Q Okay. So I understand that. Then my next question is, if you had end-of-pipe monitoring from the Flood Control District system that definitively established that those flows coming out of the District's system exceeded water quality standards, would your view be the same, that the District is not contributing to exceedances?

A Yes.

Q What if those flows were so polluted with oil and grease that they were on fire as they came out of the system? Would your view be the same, that the District is not contributing to exceedances?

A That the system the District maintains is not contributing to, yes.

Q Okay. Even if heavily polluted flows like I just described are coming out of the District's system?

A Yes, because we are talking about the physical concrete pipe discharge conveying flows.

Q Okay. So back to this third bullet under A on

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[331] of – commonly aware of.

Q Do activities on County unincorporated land generate fecal coliform?

MR. GEST: Objection. Lack of foundation, calls for an expert opinion.

THE DEPONENT: Can you be more explicit about activities?

Q BY MR. COLANGELO: Well, any of the activities that you mentioned, are those activities occurring on County unincorporated land?

A Humans habitate, you know. They habitate on County unincorporated land, so if they are a source of fecal coliform. There's wild animals. There's domesticated animals. So yes, you could have –

Q Has the District ever looked into this question? I will ask about the County in a second, but has the District ever looked at where fecal coliform, if it's found within a storm drain system, where it's coming from?

A The County has looked into this question.

Q Okay. And how so?

A Source identification.

Q Okay. When the County looked at this question, can you describe for me what the County looked at in particular?

[332] A The County sampled waters within – upstream of the receiving water and attempted to identify sources of bacteria – indicator bacteria, and through the source ID program, a portion of the lands that were of interest were County lands.

Q Okay. What do you mean by, "portion of lands that were of interest"?

A The land within the subwatershed feeding the drainage that was outletting at the beach.

Q Okay. Where fecal coliform was detected?

A Where – yes. Indicator bacteria was – including fecal coliform had been detected.

Q When you talked about looking for the source of indicator bacteria, what did you mean by "source"?

A Where the bacteria was emanating from.

Q Do you mean a particular activity that is generating the bacteria?

A I mean the location where the source exists.

Q Okay. So you don't mean whether it's coming from wildlife or humans or pets?

A Well, we'd like to be able to differentiate that way. It's not that easy to do.

Q Right. Has the County looked into that?

A We are attempting some different methods along with our – a couple other partner entities to determine [333] anthropogenic sources versus animal.

Q What are you doing to determine that?

A Looking for indicators of human versus wildlife in the source water.

Q By an "indicator," what do you mean?

A Caffeine, something that might be associated with human activity versus wildlife, brighteners.

Q An indicator would be, therefore, a marker that would help you identify the source; is that right?

A Identify the – yeah, the source, differing shape between sources.

Q Okay. Has the District – tell me, who does the monitoring for the stormwater monitoring report at the mass emissions station? Is that the District or the County?

A The District.

Q Okay. And the District has detected fecal coliform at the mass emissions stations; is that right?

A Yes.

Q Is the District aware of any other sources of fecal coliform at that – those locations besides stormwater runoff?

MR. GEST: Objection. Assumes a fact not in evidence.

Q BY MR COLANGELO: Let me go back to the [334] **earlier question. Does the District – is it the District's view that stormwater runoff is one source of fecal coliform that's detected at the mass emissions stations?**

A You know, it's not the District's position that the stormwater is the source, but that the stormwater may be conveying bacteria indicators like fecal coliform from unknown sources.

Q Okay. Is it the District's view that stormwater is conveying fecal coliform from unknown sources that are – that is being detected at the mass emissions station?

A The District – at the point that we measure at the mass emissions station where we found fecal coliform in water, we are saying the water within our system is conveying fecal coliform at that point.

Q Okay.

A Yes.

Q I'm sorry. What was that, the last word?

A "Fecal coliform."

Q What about aluminum? Is aluminum a constituent that is typically contained in stormwater?

A No.

Q Okay. Is it ever?

A Yes.

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[339] A Yes.

Q What about the four other – I'm sorry – the three other watersheds, Santa Clara River watershed –

A I would expect, as time – Santa Clara watershed hasn't been identified for metals as a TMDL concern, to my knowledge. San Gabriel, metals is being worked on now. I don't know about Ballona. So what we're doing is following EPA and also Regional Board direction on focus priority of constituents of concern.

Q In the District's view, is stormwater one source of aluminum that is detected at the mass emissions stations?

MR. GEST: Objection. Lack of foundation, calls for speculation, calls for an expert opinion.

THE DEPONENT: The expert opinion portion, I agree. Not knowing common constituents of

water, I would – you know, the mass emissions station is set to measure potential exceedances, so what we're doing is reporting what we see. Aluminum, on occasion, has shown up as an exceedance of the CTR level, so we are reporting it.

Q BY MR COLANGELO: Right.

A I don't consider the water itself the source that we're concerned with.

Q I'm not asking for any expert opinion.

A Okay.

[340] **Q I'm asking for the District's view when looking at the results showing aluminum in exceedance at each of those mass emissions stations, whether stormwater is one source of the aluminum that is being detected at those mass emissions stations.**

A Okay. And again, we kind of have been through this. It is a conveyance of that pollutant.

Q Yeah.

A But it is not, in my opinion, the source of the pollutant or potential toxicity.

Q Okay. The stormwater, though, in your view, is a conveyance of aluminum that is measured at those mass emissions stations?

A Yes.

Q What about copper? Is copper a constituent that is contained in stormwater?

A We have found copper in stormwater, yes.

Q How would you characterize the frequency of detecting copper in stormwater?

A It's commonly seen in stormwater in urbanized areas.

Q Where does copper in stormwater come from? What are the possible sources?

A We are studying that currently. One potential source is brake pads. Brake pads.

[341] **Q What are the others?**

A I'm sure manufacturing. Other sources might be salvage, salvage yards, metal works, plating plants, are all potential sources of – of these metals.

Q When you said, "brake pads," does that mean the copper in storm water is associated with vehicular traffic?

A It's associated with brake dust that is generated when you are braking in your car. It's put into the air and lands on the land, and then stormwater running over the land or urban runoff can carry that to the flood control system and ultimately passing – pass the mass emissions station.

Q Are those activities that generate copper that's found in stormwater common on County unincorporated land?

A People drive cars in unincorporated County land, yes.

Q Right. And you are saying that brake dust, when people drive on unincorporated County land, generates copper?

A Right.

Q Is this a consistent source of copper or an irregular one, would you say?

A There's speculation by California AQMD, as well [342] as the Regional Board and State Water Board, that it's a consistent source of metal entering into our water waste.

Q What is the District's view?

A Yes, it is consistent. It's consistent with studies that we reviewed.

Q Is it the District's view that copper being detected at mass emissions stations is contributed by stormwater?

A It's conveyed by stormwater, not contributed.

Q I will use that word in the future. So let me ask that question again. Would you say that it's the District's view that copper measured at

mass emissions stations is conveyed by stormwater?

A We're measuring a conveyance of water, and in that conveyance, we found copper, so yes.

Q What about zinc? Is zinc a constituent that is contained in stormwater?

A It's a constituent that has been found in stormwater.

Q How often? How would you characterize the commonalty of zinc in stormwater?

A I would have to look at data, but I know for L.A. River it's been found consistent in L.A. River.

Q What about for the others? What about for

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[347] **Q Is zinc conveyed by stormwater in the District's MS4 system?**

A It has been found to be conveyed by stormwater through the Flood Control District system, yes.

Q The waters where the mass emissions monitoring is conducted?

A Yes.

Q Is zinc conveyed by stormwater on County unincorporated land?

A I don't know.

Q Do activities on County unincorporated land generate zinc that is conveyed by stormwater?

A I don't know.

Q And the County doesn't know?

A Does not know.

Q What about cadmium? Is cadmium a constituent that's contained in stormwater?

A It has been found to be conveyed by stormwater, yes.

Q When cadmium has been found to be conveyed by stormwater, what are the sources?

A My understanding, cadmium can be naturally occurring, again, could be – industrial uses could be a source of cadmium, and that's about the extent of what I know about cadmium.

[348] **Q By "naturally occurring," you mean that it's contained – it is a mineral contained or metal contained within sediment or tell me what you mean by that.**

A Could be geologic. It could be in sediment. It could be latent. It could be a legacy constituent in sediment that is being conveyed or being eroded and being conveyed and suspended by that sediment in the water.

Q By "legacy constituent," do you mean it was generated by a previous industrial activity?

A Industrial use, dust, brake, can be conveyed through the air as a dust particle and land. Could be covered over by time and pulled back up by erosion.

Q Do activities on County unincorporated land generate cadmium?

A I don't know.

Q Does, in the District's view, mass emissions monitoring that measures exceedances or that measures cadmium reflect conveyance of cadmium in stormwater?

A Yes.

Q Does it reflect the conveyance of cadmium in stormwater in the District's MS4 system?

A Yes.

Q Are there other sources that you would identify [349] **besides stormwater for cadmium that's detected at the mass emissions stations?**

A Airborne. Airborne dust with metals in it could be a source. But right at that station, it wouldn't be a huge contribution, obviously.

Q I'm sorry. What would be a huge contribution?

A I said would not be potentially a huge contribution at that station.

Q Airborne dust would not be a huge contribution?

A Not at that specific station and for the purpose that we're sampling.

Q Any other sources?

A Not that I'm aware of.

Q Is chloride a constituent that's contained in the stormwater?

A It's been known to be conveyed by stormwater, yes.

Q How would you characterize the frequency of the conveyance of chloride in stormwater?

A I don't know it to be common, but I do know it exists in certain watersheds more than others.

Q Which watersheds?

A Santa Clara River.

Q Does it also exist in the L.A. River watershed?

A I would imagine it does. I can look it up.

[350] **Q It's Table 4-4.3 in Exhibit 42, on the first page of that table under "General." Do you see chloride?**

A 4-4.3?

Q 4-4.3.

A Yes. I do see chloride.

Q Now, flip back to 4-4.2 for Malibu Creek, the first page of that table.

A Okay.

Q That was chloride as well?

A That was zero exceedances, yes.

Q What about on Table 4-4.5, chloride, and that also lists zero exceedances. Let me know if that is right.

A Yes. It's listed in zero exceedances.

Q What are the sources of chloride conveyed in stormwater?

A I understand that it's been – chloride has been attributed to water softeners, salt-water softeners.

Q How does that lead to its conveyance in stormwater?

A The discharge of waters from systems using softened water, I understand, can reach the rivering system through either uncontrolled or through storm

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[363] the area, but that is what I know about cyanide.

Q Do you know about any other sources?

A No, I do not.

Q What about vehicle exhaust?

A Don't know about that.

Q What about pesticides?

A Don't know about that.

Q Do you know whether – or does the County know whether activities on County unincorporated land generate cyanide that's conveyed in stormwater?

A I don't know.

Q The County doesn't know?

A The County does not know.

Q In the District's view, do cyanide detections at the mass emissions stations reflect the conveyance of cyanide in stormwater?

A Yes.

Q Do they reflect the conveyance of cyanide from any other source, to the District's knowledge?

A It reflects a source of cyanide other than the MS4 system.

Q What do you mean by that?

A That the MS4 system does not generate cyanide.

Q Okay. I'm sorry. In the District's view, are there any other sources of cyanide that's detected at [364] **the mass emissions station besides the conveyance of cyanide in stormwater?**

A At the station itself? In other words, is there some cyanide present at the station or is it in the stormwater only?

Q No. I'm asking, when cyanide is detected at the mass emissions station, is it the District's view that there are any other possible sources for that cyanide besides the conveyance of cyanide in stormwater?

A We were sampling the stormwater. That's where we found it. So there wouldn't be any other source there.

Q Why do you say you're sampling the stormwater?

A We are pulling stormwater from the mass emissions station.

Q Are you referring to a particular mass emissions station?

A Each mass emissions station samples the water within the MS4.

Q So -

A It's conveying stormwater.

Q So the District's view is that each mass emissions station reflects what's in stormwater?

A Yes.

Q Conveyed by the District's MS4?

[365] A Yes.

Q For lead, is lead a constituent that is contained in stormwater?

A Yes.

Q Where does lead in stormwater come from?

A Lead is naturally occurring in nature, as well as used in manufacturing, all types of manufacturing. And so there are many potential sources of lead that could end up in stormwater.

Q Do activities on County unincorporated land generate lead that's conveyed in stormwater?

A I don't know.

Q Does the County know?

A No.

Q The lead that is detected at the mass emissions station, it's the District's view that that lead reflects the – sorry – that those

detections reflect the conveyance of lead in stormwater from the District's MS4 system?

A Again, it reflects the stormwater being conveyed in the system is carrying lead, naturally occurring or otherwise.

Q So the answer is yes?

A Yes.

Q I've got seven more of these. Do you want to [366] **take a break?**

A Let's go.

Q Okay. Silver.

A Unless someone else wants to.

Q I'm fine. Do you want a break?

Is silver a constituent that is contained in stormwater?

A Silver has been found to be contained in stormwater, yes.

Q Where does silver that is contained in stormwater come from?

A I don't know.

Q Does the District or the County have any understanding of where silver in stormwater comes from?

A Other than naturally occurring, neither the County nor the District has ID'd sources of silver.

Q Do activities on County unincorporated land generate silver that is conveyed in stormwater?

A I don't know.

Q Does the District believe that sampling that shows detections of silver at mass emissions stations reflects conveyance of silver from the District's MS4?

A Conveyance – I'm having trouble with the term, "from." Within system, we have found silver to be contained in stormwater.

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[379] A It's kind of specific to almost anything that can be wind blown or carried in the system.

Q Okay. So are you saying that detections of nitrite at the mass emissions station –

A Yeah.

Q – may be reflecting wind-blown nitrite and not nitrite in stormwater?

A No, that's not what I'm saying.

Q Okay.

A When we pull sample stormwater in our system at the mass emissions station, it reflects water being conveyed in our system carrying these

pollutants of concern, and it's being conveyed in our system.

Q That's what is shown when there is a sample at the mass emissions station?

A When you find any constituent of concern, what it says is the water in your system, if the mass emissions station is located in your system, is carrying and conveying these things, and that's a portion of your system.

Now, Malibu Creek, for instance, it's not in a portion of our MS4 system. They actually sample a location in the creek with no restriction present as part of the mass emissions station sampling. So that station isn't one that is actually in the MS4 system.

[380] **Q What about the Los Angeles River?**

A Los Angeles River is.

Q What about San Gabriel River?

A Yes, it is in the San Gabriel River.

Q Mass emissions station?

A Yes. It is in our MS4 system – portion of the MS4 system.

Q What about the Santa Clara River mass emissions station?

A It is in the Santa Clara River, but I'm not sure if it's in our MS4. I would have to find that one

out for you. I know we don't have large-scale infrastructure in that river so . . .

Q What is the District's view, then, of what detections of a particular constituent at the Malibu Creek mass emissions station reflect about the presence of those constituents in stormwater conveyed by the District's MS4 system?

A It's not clear whether it's those that are present in our system. That's a naturalized creek section that is draining a large watershed. A piece of the MS4 is up in that watershed, but I can't be certain based on mass emissions station samples that it's actually being conveyed, that whatever that pollutant was conveyed by our system.

[381] **Q Okay. Even though the District system outlets to the Malibu Creek upstream of the mass emissions station?**

A It – that's correct. In a tributary, we have a piece of infrastructure that would – at least flows into our tributary and onto Malibu Creek, and then much farther downstream, we are measuring – some mass emissions station is measuring the chemistry of the water.

Q Are you referring to only one particular piece of infrastructure in a tributary to Malibu Creek?

A There is very, very few pieces of infrastructure in Malibu for the Flood Control District. I've

seen the ones that operate Medea Creek and Cheseboro and Las Virgenes.

Q And do those each outlet into a tributary to Malibu Creek upstream of the mass emissions station?

A Yes, they do.

Q To make sure I understand your testimony, then, about what detections at the Malibu mass emissions station reflect, is it the District's view that the detections of each of these constituents of concern that we talked about, about a dozen or so, when measured at the Malibu mass emissions station – let's phrase it this way. What is the District's view about what [382] **detections of those constituents of concern measured at the Malibu Creek mass emissions station mean about the conveyance of stormwater from the District's MS4 system?**

A Means absolutely nothing.

Q Your view is that, if there is a constituent of concern detected at Malibu mass emissions station, it tells you absolutely nothing about whether the District's MS4 is conveying stormwater that contains that particular constituent?

MR. GEST: Objection. Asked and answered.

Q BY MR. COLANGELO: Could you answer the question?

A That's correct, your statement, there is no – there is no information to be gathered at the mass emissions station regarding the MS4 system upstream in Malibu Creek.

Q Why is that?

A Uncertainty of the conveyance, as stated earlier, the storm drain system is not the source of pollutants of concern, the distance. And you have to recognize that there's a large distance from the nearest piece of infrastructure maintained in – just that physical distance between – and the size of the watershed that is discharging to Malibu Creek and then on down through the canyon or upstream of Malibu Lagoon.

[383] **Q That answer you just gave for the Malibu Creek mass emissions station, is that limited to that mass emissions station because of where it's located?**

A It's – you know, it's the District's view that mass emissions stations reflect the four samples that are supposed to be indicated as an objective of the Regional Board to tell them something about what the quality of water flowing at a certain time in a certain place in that watershed. That's all we know about that water. We don't know anything other than that.

Q Right. Going back to the location of the mass emissions stations, the mass emissions stations for, I believe you said, Los Angeles

River and the San Gabriel River are located within the District's MS4; is that right?

A Yes.

Q So the detection of constituents at those mass emissions stations shows the conveyance of those constituents by the District's MS4; is that correct?

A It shows those constituents being conveyed in that portion of the MS4's – I mean, mass emissions stations located is conveying water with those constituents of concern, yes.

Q In the District's MS4?

A Yes.

[384] **Q And you don't know one way or the other for the Santa Clara River mass emissions station; is that correct?**

A That's correct.

Q Because of uncertainty about where it's located?

A The specific location, that's correct.

Q Okay. If I showed you a map, would that help?

A Yes.

Q Okay. Let's go off the record for a second.

(Discussion off the record.)

MR. COLANGELO: Let's go back on the record.

Q I am showing you what was previously marked as Exhibit 15.

Howard, do you need a copy of this?

MR. GEST: No, I got one.

Q BY MR. COLANGELO: Exhibit 15 is a color map of the location of the mass emissions sampling sites; is that right?

A Yes.

Q Okay. In looking at this, does it help answer the question about the Santa Clara River mass emissions station?

A Unfortunately, no, it doesn't.

Q Why not?

[385] A The map is not detailed enough to know whether we have a section of the MS4 system in that location.

Q Okay. Is that something you could find out?

A Yes.

Q Okay. I will ask you again tomorrow. Thanks. Let's take a break.

(Recess.)

MR. COLANGELO: Let's go back on the record.

Q Before the break, we discussed about a dozen – I think there were 14 – constituents that are conveyed in stormwater; is that right?

A Yes.

Q Okay. And for three of them, I believe you testified that the County is aware that activities on County land generate that constituent. I think they were fecal coliform – let me go back. I'm sorry – fecal bacteria, total dissolved solids, and copper. Is that right?

A Yes.

Q For any of the others – let me just list them to make sure I understood your testimony correctly. Let me know if the County is aware whether any of these other constituents are generated by activities on County land. Okay?

A Okay.

[386] **Q Aluminum?**

A Don't know.

Q Fecal coliform, you said, "Yes"; is that right?

A Yes.

Q Copper, you said, "Yes"?

A Yes.

Q Zinc?

A Don't know.

Q Cadmium?

A Do not know.

Q Chloride?

A Do not know.

Q Antimony?

A Do not know.

Q Cyanide?

A Do not know.

Q Lead?

A Do not know.

Q Silver?

A Do not know.

Q Sulfate?

A Do not know.

Q Total dissolved solids, I believe you said, "Yes"?

A Yes.

* * *

[451] **treatment in-system is appropriate?**

A Well, it's sort of a backstop, last – I would – our approach is that's the last stop, last step. First step is to identify the sources and, especially at that scale, try to get those sources under control before you place some kind of regional treatment in. So, you know, I hate to see us just go ahead and tell everybody, "Okay. It's okay to pollute the rivering system" or – I shouldn't say pollute, but discharge what could be a pollutant into the system without actually going to source. So source control is the principal approach by the County of Los Angeles.

Q And is that something that the County has control over?

A Well, the County has installed low impact development standards for its entire unincorporated areas. The County has installed or adopted – excuse me – low impact development standards, and this is a source-control program. So, I mean, the actions we've taken should prove that this is something we are committed to. That's despite permit requirements.

So source control, monitoring, determining that you do have a problem, that it's anthropogenic in nature, if you can determine that, develop an idea about what the source is, get the source control over there, [452] and then if you can't – last-ditch is to build infrastructure to try to treat.

Q When you say, "despite permit requirements," did you mean in addition to permit requirements?

A The County on its own dime and own discretion decided to adopt a low impact development standard out of an environmental initiative.

Q You didn't mean in contravention of the permit?

A No. Absolutely not, no. And so that's our approach.

Q For the NOVs – excuse me – the District and the County, has the Regional Board told, start with the District, that the Board has made a determination that the District is not responsible for those exceedances listed in the NOVs?

A No.

Q What about for the County? Has the board told the County that the Board has since made a determination that the County is not responsible for those exceedances in the NOVs?

A No.

MR. COLANGELO: Okay. Let's stop for the day.

THE DEPONENT: Thank you.

MR. COLANGELO: Let's go off record.

(The following stipulation was reached [453] between counsel at the deposition of Mark Pestrella, Volume IV:

"MR. GEST: Shall we stipulate that we will relieve the court reporter of her duties, that the original can be sent to my office. I will forward it to Mr. Pestrella for his review. He will have 30 days after his receipt in order to review it, make any corrections that he may want to make. Upon his review, he will then return it to me. I will take responsibility for giving you notice of any changes that Mr. Pestrella has made. And we will agree that, if at trial or at hearing the original is not available, a certified copy of the transcript can be used.

"MR. COLANGELO: That's fine.")

(The deposition adjourned at 4:37 p.m.)

[454] I have read the foregoing deposition transcript and by signing hereafter approve same.

Executed at _____ on _____.
(Place) (Date)

_____
MARK PESTRELLA

* * *

[472] A We described this yesterday. The Flood Control District, along with the County of Los Angeles unincorporated area, the 84 cities have a set of

infrastructure or ownership of drainage areas that is considered total – comprehensively as the MS4 system draining the Greater Los Angeles Basin. And we talked about MS4 definition yesterday so I won't go there, but that is – that is – that system is comprised of an incredibly complex series of drains, open channel, naturalized sections, structures that convey flows from one point to another within Los Angeles County.

Q Does that system commingle flows from many discharges?

A Yes.

Q To what extent?

A Massively. It – yes.

Q In response to checking the box "Yes" on Page 6 of this exhibit – we are talking about Exhibit 46 – did the County prepare a receiving water limitations report?

A What year is this report?

Q 2006 to 2007.

A Yes.

Q Did the District prepare a receiving water limitations report?

[473] A I would have to look at the receiving water limitations report for that year.

Q Why don't I show it to you.

Please mark that as 47.

(Exhibit 47 was marked for identification.)

Q BY MR COLANGELO: Take a look at what's been marked as Exhibit 47, and let me know when you've had a chance to review it.

A Okay.

Q Look at the first sentence on Page 1 of the document.

Before we do that, could you identify the document?

A A receiving water limitations compliance report.

Q What is the date?

A The date is October 15, 2007.

Q Was this submitted on behalf of both the County of Los Angeles and the Flood Control District?

A It was submitted on behalf of the Los Angeles County Flood Control District.

Q Only?

A Yes.

Q And not the County?

A That's correct.

[474] **Q Is this the receiving water limitations report for 2007 that was submitted in response to the – or in conjunction with the '06-'07 individual annual report?**

A Yes.

Q And have you seen the document before?

A Yes, I have.

Q Were you involved in its preparation?

A Yes.

Q In what way?

A I was in charge of the division who prepared this document. The document was prepared under my direction.

Q Is that the Watershed Management Division?

A Yes.

Q Look at the first sentence on Page 1. It says, "Part 2.3 of the Permit requires the permittees to submit a Receiving Water Limitations (RWL) Compliance Report upon determination that discharges are causing or contributing to an exceedance of an applicable water quality standard."

Do you see that?

A Yes.

Q Did the District determine that discharges were causing or contributing to an exceedance of an applicable water quality standard?

[475] A State it again, please.

Q Did the District determine that discharges are causing or contributing to an exceedance of an applicable water quality standard?

A The District stated a fact in the first sentence under the permit. The permit requires the following document. If you read the next line, the District is being a good guy and actually trying to address some exceedances that they are seeing at the end of this MS4 system, but not necessarily contributing those exceedances to anything that the District or the County of Los Angeles has done.

Q I will get to that sentence in a second. I am asking a different question, which is: Did the District determine that discharges are causing or contributing to an exceedance of an applicable water quality standard?

A No.

Q That no discharges were contributing?

A Correct.

Q In the second sentence, it says, "Nothing in this report should be construed that the County or the District is the source of any exceedance of an applicable water quality standard."

Do you see that?

A Yes.

[476] **Q What do you mean by "source"?**

A That nothing – that the County or the District are not – should not be construed to be the source of any exceedance that we are seeing at a mass emissions station.

Q And what do you mean by "source"?

A The mass emissions station is measuring exceedances of specific pollutants of concern, and so the – what I mean by "source" is that there is no admission that the County or the District are the source of that pollutant of concern being measured at the mass emissions station.

Q I'm sorry. I still don't understand what you mean by "source." Are you saying that the County and the District are not generating a pollutant?

A That is correct. There is no admission that a pollutant is being generated on lands or an infrastructure that is owned or operated by the County of Los Angeles or the Flood Control District.

Q Are you saying that neither the County nor the District are conveying that pollutant?

A Well, that depends upon where we measured, where the mass emissions station is located. That's the only place we know that the flow is being measured that has exceedance in it.

[477] **Q Why does it depend on that?**

A Because it's the only location that we are aware of where – and the reason that we are marking off "Yes" on Item 2A is that we have measured waters in a location that may be colocated with or within infrastructure owned or operated by the Flood Control District. So if those instances where we have that, L.A. River, and it's L.A. County Flood Control District right-of-way, and we made a measurement of flows there, then there is flow that we are measuring that was in our system that is conveying a pollutant of concern to some level, whether it's an exceedance or not.

Q And when you say, "in our system," did you mean the District's system?

A Yes.

Q The District's MS4 system?

A Yes.

Q And where else is that the case? In the San Gabriel River – at the San Gabriel River mass emissions station, too?

A Yes.

Q And I think you said yesterday that that is not the case at the Malibu Creek mass emissions station.

A That's correct.

Q And you don't know whether it's the case for [478] **the Santa Clara mass emissions station?**

A Correct. We are confirming that.

Q And you are not changing your testimony about that that you gave yesterday; is that right?

A That's correct.

Q In that sentence, Sentence 2 of Exhibit 47 on Page 1, where it says, "Nothing should be construed that the County or the District is the source," do you know one way or another whether the County is the source?

A That would be dependent upon – in general, it would be, no, I don't know, but it also is dependent upon which watershed we are talking about.

Q Why?

A Because, in some instances, it's definitively a no, and in other cases, it's a – there is a potential without knowing.

Q And in which instance is it definitively a no?

A Where the County unincorporated area does not drain to a point which would eventually end up in – or be measured by a mass emissions station.

Q And for which of the four mass emissions stations we have been talking about is that true?

A When we say, "County," we are talking about over 100 County unincorporated islets.

Q Right.

[479] A So there are many islands that do not get drained to, say, Malibu Creek.

Q Right.

A Or drained to the L.A. River. So we almost have to speak about a specific island of unincorporated land if we are going to talk about knowledge of drainage areas and where they drain or whether or not they drain to the mass emissions station.

Q I'm asking a different question which is, for the mass emissions stations – we can go through them one at a time – do you know one way or the other whether County unincorporated land drains to that mass emissions station, not do you know where each island drains to? Do you understand what I mean?

A Yes. It could be confirmed in – I can speak to San Gabriel and L.A. River, that there are islands within that – those watersheds that drain to – eventually drain to that rivering system, and ultimately that runs by the mass emissions station.

Q By "islands," you mean County unincorporated areas?

A Yes.

Q And you're using the word "islands" to refer to that?

A Yes. That's correct.

* * *

[508] trying to regulate stormwater in general in the United States, is you have storm events that occur uncontrolled, and you're trying to attribute it to a land area. It's not effective, so there really is no controls you can put there.

Q In the County's view, when would you know if the permittees collectively are contributing to exceedances of water quality standards? Under this permit. I'm talking about this permit.

A I don't know.

Q The County doesn't have any position of – regarding what it would take to establish that the permittees are contributing to exceedances of water quality standards?

A That's correct.

MR. GEST: Other than – you are asking now not a legal conclusion?

MR. COLANGELO: No, I'm not asking for a legal conclusion.

Q And what about for an individual permittee? Take the County. What is the County's view about what it would take to show that the County were contributing to exceedances of water quality standards?

MR. GEST: Again, object to the extent you are asking for a legal conclusion or opinion from this [509] witness.

THE DEPONENT: Yeah. I can't make a legal conclusion.

Q BY MR. COLANGELO: I am not asking for your legal conclusion.

A An exceedance – you measure whether we are contributing to an exceedance downstream at a point somewhere downstream within a watershed? In other words, we are a component of a larger watershed, what would it take to know whether or not the County is contributing?

Q I'm talking about, for this permit, what would it take for you to know that the County were contributing to an exceedance of a water quality standard?

A You cannot. It's impossible, in my mind, to know.

Q What about the District?

A District doesn't contribute to exceedances.

Q In your view, then, the District could never be contributing to an exceedance of a water quality standard?

A That's true.

Q Turn back to Page 23 of the permit. Under Paragraph 3(a), take a look at that paragraph, and let [510] **me know if you are familiar with it.**

A Yes, I am.

Q That paragraph requires a permittee to prepare a receiving water limitations compliance report in certain circumstances; is that right?

A Yes.

Q When, in the County's view, is the County required to prepare such a report?

A You know, we've asked the Regional Board since 2001 when we should. We never really got a straight answer. There's a mass confusion about when this should be. I think we were cautionary in the two times that we did submit an RWL, the Flood Control District, but really, to understand when that should

happen, and you can see by record, I don't believe any other permittee – copermittee has submitted an RWL because there's so much confusion about what the hell that language means. I think the Regional Board will tell you the same thing.

Q What's the County's view about when you are required to submit an RWL?

A I don't know that the County ever – strictly speaking, the County would ever submit an RWL given the current construct of this permit.

Q Why?

[511] A Because there's no way to prove that the County caused or contributed to an exceedance at the mass emissions station.

Q So other than for – I forget the word you said – proactive or –

A Cautionary.

Q – cautionary reasons –

A In the interest of water quality improvement.

Q – the County – other than for those reasons, the County wouldn't believe it was required under this permit term to submit an RWL?

A An RWL, in our view, is a method to adjust our stormwater quality management plan in any given year, other than the year you get a new permit.

And so this is sort of an reopener, and so we use it that way to say, "Please be aware we are doing the following, and we would like to change certain things." So it is an opportunity for us to respond to them and ask for an adjustment.

It – the two times that we have submitted an RWL, the Flood Control District submittals, what we basically wanted to do was notify the Board that we think there's a better way to go about a permit and that they should also know there are things happening with respect to the permit that they aren't documenting that [512] we would like them to document, and that is improvements, capital improvements that have been put in place that actually should help with those potential exceedances that we are seeing or those exceedances that we are seeing at mass emissions stations.

Q For the record, I think it's three RWL reports the District has submitted.

A Yeah.

Q Do you have a different understanding of that?

A Well, my recollection is two, but if it's three, I will take your word for it.

Q Fine. In the County's view, when is it required under this provision of the permit – required – to submit an RWL report?

MR. GEST: Objection. Asked and answered.

Q BY MR. COLANGELO: Is your answer never?

A Never. It would be never. Permit says when you have a known contribution to an exceedance, and I already stated its impossible to know whether you caused or contributed to it, so it would be never.

MR. GEST: I apologize. Your question was for the District this time?

MR. COLANGELO: That was the County.

MR. GEST: Then my objection was correct.

Q BY MR. COLANGELO: Is that your understanding?

[513] MR. GEST: My objection was correct.

Q BY MR. COLANGELO: I want to make sure the record is clear because we were talking over each other. Did you understand that previous question to be asking about the County?

A Yes.

Q Now, what about the District? For this provision of the permit, Part 2.3(a), when in the District's view would it be required to submit an RWL report?

A The District – interesting – in its principal permittee title, although it doesn't require of the principal permittee, acted in a way to actually provide an RWL based on information the principal

permittee had about the larger MS4 system. The District itself, in its own permit requirements, I believe doesn't have any responsibility to submit an RWL.

Q Under this provision of the permit?

A Correct.

Q Ever?

A Strictly, strict compliance with the permit, it would be the same answer as the County, never.

Q What do you mean when you said that, in its – strike that.

Is your testimony that, in the District's role [514] **as principal permittee, it would have different obligations with respect to this permit term?**

A No. But the District has acted as a liaison in its role as principal permittee and has somewhat left – it has – over time, the District has taken that to mean that we should be working proactively with the larger watershed group, although the permit doesn't actually spell that out, so that – as the District – information became available to the District about the larger MS4 system and exceedances, the District felt, in an annual report, that it would be appropriate to make a submittal to the Regional Board formal.

Q Your testimony, though, is that, whether acting on its own behalf or as a principal permittee, the District under this provision of the

permit would never be required to submit an RWL?

A Would never be and has never been before. It has never been required to and would never have to.

Q Turn to Page 21 of the permit.

A Page again?

Q 21. Look at Part 1.A about halfway down the page. Do you see where I am?

A Yes.

Q Are you familiar with that provision of the permit?

[515] A Part 1.A?

Q Yes.

A Yes.

Q Is it correct that Part 1.A states that "The permittees shall effectively prohibit nonstormwater discharges into the MS4 and watercourses" except in certain circumstances that are listed below?

A Yes.

Q Can I refer to this as the prohibition against nonstormwater discharges?

A Yes.

Q What do you take that to mean, that provision in the permit?

A Nonstormwater is controversial.

Do we have a definition in the permit? I can't remember.

Q There is in the permit. Do you want to look at that?

A Yes.

Q It's on Page 64.

A Okay.

Q It states on Page 64, "Nonstormwater discharge means any discharge to a storm drain that is not composed entirely of stormwater."

Do you see that?

* * *

[608] District.

Q But the District's view is that, no matter what constituent we are talking about, it cannot contribute to exceedances of water quality standards because it's only a conveyance?

A That is correct.

Q And since this iteration of the permit in 2001, the permit involved in this litigation, has the District always held that view?

A Yes.

Q What is that conclusion based on?

MR. GEST: Objection to the extent it seeks a legal conclusion. Objection to the extent it may invade attorney-client communications.

Otherwise, you can answer.

THE DEPONENT: It's based on rational and empirical evidence that a – the infrastructure that the District owns and operates cannot reasonably be found to generate constituents of concern given the nature of the infrastructure and the purpose of the infrastructure.

Q BY MR COLANGELO: So it's based on the fact that the District doesn't generate any constituents; it only conveys them?

A That's correct.

Q Any other reason?

[609] A No.

Q Is it based on anything expressed in the permit?

A I think the permit in its – and the regulations in there confirm that position.

Q How so?

A In that it's stated in a number of places, and maybe not in the permit explicitly, but in related

documents, that the source of these pollutants of concern are from activity in – specifically, anthropogenic activities on land that are conveyed by stormwater to a system.

Q What are you referring to?

A Almost every EPA document, many, many findings by many scientists in this arena, workshops with Regional Board.

I mean, all of our activity is focused on the control of pollutants at the source. The source is usually identified – and when we talk about sources, that source as stated by the Regional Board. Many times, the sources that they are attempting to control are anthropogenic sources. And so it's reconfirming over and over that it's a land – that portion that can be allocated to humans is related to human activities on land and not related to the flow of stormwater through a [610] storm drain.

Q Is that an elaboration of your earlier answer, that it's the - the District's MS4 isn't generating the pollutants; it's only conveying them?

A That's correct.

Q Have you ever conveyed this view to the Regional Board, that the District can't be contributing to exceedances for the reason that you elaborated?

A Yes.

Q When?

A In responses to notices of violation. We spoke yesterday specifically about bacteria TMDL, Santa Monica Bay Bacteria TMDL notices of violation issued on March 4 of last year. In staff-to-staff conversations and TMDL development proceedings, you know, professional – professional conversations between – staff-to-staff conversations.

Q You mentioned notices of violation. Are you referring to anything other than the March 4, 2008 NOVs?

A Only – that's the – that is a specific condition that I can recall. We also made these – these conclusions were stated in – and positions were stated in hearings related to that bacteria TMDL, hearings that were related to opening – reopening our NPDES permit and placing a TMDL into our permit.

[611] **Q Did you have any other NOVs in mind when you mentioned notices of violation –**

A No.

Q – besides the March 4, '08 NOVs?

A No.

Q What staff-to-staff conversations are you referring to?

A It's a common occurrence for staff from the Regional Board to conduct conversations and interaction with my staff in the Watershed Management

Division in the implementation or enforcement of the Clean Water Act regulations.

Q I mean, specific to this issue, the District's conclusion that it cannot be contributing to exceedances because it's only a conveyance, are there particular conversations that you are referring to in which that was conveyed to the Regional Board?

A L.A. River – the L.A. River, meetings related to L.A. River metals TMDL, recent meetings related to – I'm not sure which TMDL it is. It's the Long Beach. Hearings that were occurring in Long Beach regarding – I'm not sure if it's metals TMDL or bacteria TMDL, to be honest with you. They had open-forum discussions of this issue in water symposiums with – where the executive director of the Regional Board sits on a panel

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., and SANTA MONICA BAYKEEPER,	)	
Plaintiffs,	)	Case Number CV 08-01467 AHM (PLAx)
v.	)	
COUNTY OF LOS ANGELES, et al.,	)	
Defendants.	)	

Deposition of FRANK WU, taken on behalf of the Plaintiffs, at 1314 Second Street, Santa Monica, California, commencing at 9:13 a.m., Thursday, May 14, 2009, pursuant to Notice, reported by K.C. Belden, CSR No. 6728, RPR, CRR.

(Filed Sep. 8, 2009)

* * *

[75] been any – has the district done any work to gather this kind of information?

A Yes. We have been in the process of designing this program for the last year and a half or so.

Q Okay.

A The design has not been completed.

Q Does this effort have sort of a working name within the Watershed Management Division?

A Yeah. We call it the countywide monitoring program.

Q You mentioned a moment ago a particular piece of information, I think – I think you said this; please correct me if I got this wrong. But that one thing that would be useful to have, for example, would be monitoring data from a pipe that drains discharges from a particular city and that discharged into a stream that has a mass emissions monitoring station in it.

Is that correct?

A Yeah. In a very simplified form, yes.

Q Would the same kind of information be useful to collect for a county pipe that discharged into a stream that included a mass emissions station?

A Theoretically, one would measure a county's contribution by measuring a county pipe, yes.

Q Why do you say "theoretically"?

[76] A I say "theoretically" because, in reality, the county and the flood control district's MS4 system is very complex and there are hundreds of outlets, and it would just not be feasible to monitor all those outlets, so –

And also we're not talking about discharges regulated by the state's general permits, so –

But recognizing the complexity of the problem, what we proposed in 2007 was the first step, moving from the seven mass emission stations upstream. We realized we wouldn't get to measuring hundreds of pipes, but we wanted to work with the regional board to see how we can advance stormwater monitoring to add more accountability to these programs. Because we understand that's what the regional board is looking for, and that makes sense, so. . . .

Q Okay. And when you say – You just mentioned the word "upstream." I assume you mean upstream of mass emission stations?

A Correct.

Q Have you had any conversations with any regional board staff or state board staff about this proposal?

A Very briefly.

MR. GEST: Okay.

* * *

BEFORE THE STATE WATER
RESOURCES CONTROL BOARD

STATE OF CALIFORNIA

PETITIONS OF THE CITIES OF BELLFLOWER, ET AL., THE CITY OF ARCADIA, AND WESTERN STATES PETROLEUM ASSOCIATION (REVIEW OF JANUARY 26, 2000 ACTION OF THE REGIONAL BOARD, AND ACTIONS AND FAILURES TO ACT BY BOTH THE REGIONAL BOARD AND ITS EXECUTIVE OFFICER PURSUANT TO ORDER NO. 96-054, PERMIT FOR MUNICIPAL STORM WATER AND URBAN RUN-OFF DISCHARGES WITHIN LOS ANGELES COUNTY)	)	SWRCB/OCC FILES: A-1280 A-1280(a) A-1280(b)

TRANSCRIPT OF PROCEEDINGS

June 8, 2000

9:00 A.M.

Community Meeting Hall
Torrance Cultural Arts Center
3350 Civic Center Drive
Torrance, California

(Filed Sep. 8, 2009)

REPORTED BY:
Terri L. Emery,
CSR No. 11598
Our File No. 1-64807

* * *

[5] TORRANCE, CALIFORNIA, JUNE 8, 2000 – 9:00 A.M.

* * *

CHAIRMAN BAGGETT: We're back in session. Where we left off was the Regional Board's case-in-chief.

MR. LEON: Good morning, Chairman Baggett and Board Members.

We will go ahead and start off today with testimony from Dennis Dickerson and then I will follow with some legal comments, coverage of some of the legal issues that have been discussed in the petition.

We'll start off with testimony from Dennis Dickerson, the Executive Officer, and he will talk about the development of the SUSMP and many other issues related to the issuance of the document. I will cover legal issues and Dr. Xavier Swamikannu will follow me discussing the technical basis of the SUSMP. Following him will be our Chairman, Mr. David Nahai, with the Board Member perspective.

With that, we'll start off with Dennis Dickerson.

DENNIS DICKERSON,

having been previously sworn, testified as follows:

STATEMENT OF DENNIS DICKERSON

MR. DICKERSON: Thank you and good morning, Mr. Chairman, Members of the State Board.

For the record, I am Dennis Dickerson, Executive

* * *

[7] tomorrow there's going to be a workshop sponsored by the County of Los Angeles Department of Public Works to specifically discuss the implementation of the SUSMP that you're considering today. It's my understanding that there are some 400 people who are scheduled to participate in that workshop to talk about the technical aspects of the SUSMP proposal. I'm going to skip that slide.

When you view the Los Angeles basin from above, you see a vast expanse of developed lands. The buildings, roads, parking lots and sidewalks all serve to convey stormwater to the ocean as quickly as possible, altering the natural system that once allowed for infiltration and the wetlands that acted to delay the passage of fresh water to the ocean. The 10 million people who now live and work in the L.A. basin today knowingly or unknowingly contribute to the detritus of urban life which contaminates our stormwater. This contamination is a serious problem that threatens the public health and the environment.

To begin, we would not be here were it not for the serious problem southern California faces regarding stormwater pollution. We know from monitoring data

that urban land uses generate large loadings of pollutants including toxic metals which in turn form toxic hot spots and sediments. Litter is ever present and at times is discharged in volumes in huge floating rafts of litter that repeatedly soil our beaches.

[8] Oil drippings from cars, fine copper dust from the wearing away of auto brake pads, wastes in every description, unless intercepted, all find their way to the storm drain system, our rivers, and ultimately our beaches and the ocean. This fact we cannot escape.

The urbanization of land is inherently polluting. More development, absent the mitigation measures before you, will inevitably result in greater pollutant loading.

Monitoring data from Los Angeles County clearly identifies the problem of incredible magnitude. Here we see that average seasonal loadings of critical pollutants from the City of Los Angeles are measured not in pounds but in tons. The City of Los Angeles represents 29 percent of the pollutant load. The remaining jurisdictions contribute an additional 71 percent of the total, dramatically increasing the loading of these critical pollutants.

A recent report by the Southern California Coastal Water Research Project documents impacts of stormwater run-off on the receiving waters of Santa Monica Bay, and this particular report was introduced to you yesterday briefly.

The study reviewed data from 1996 through 1998 with a focus on Ballona and Malibu Creeks. Key results from the study show that stormwater plumes persist up to three days, show product toxicity in nearly every sample collected, and is toxic up to two miles offshore and that [9] zinc and copper are the contaminants most responsible for that toxicity.

In addition to the immediate effects that contaminated water cause, offshore sediments are also contaminated with various pollutants and this is documented more than one mile offshore. And here on the next slide you see a cloud of surface layer toxicity extending outward from Ballona Creek nearly two kilometers following a storm event that occurred on or shortly before December 10th, 1996. The area shown in red portrays the areas most affected by chronic toxicity.

The study also shows that the results of stormwater pollution can be seen for months and years following discharge as contaminants become trapped in offshore sediments. The SCCWRP study documented sediment contamination more than one mile offshore.

Litter is also a significant pollutant and is so prevalent that this region has invoked enforcement of the notice to meet and confer provision over the Los Angeles County municipal stormwater permit finding that the existing stormwater management plans are inadequate to resolve this problem. We are using the notice to meet and confer provision of the permit as

intended, to address violations of receiving water standards and to address a serious condition of nuisance.

Not surprisingly, many of our waters are listed on the federal 303-D list of impaired waters. There are hundreds of individual listed impairments. Coliform, [10] litter and heavy metals and various organic compounds have found their way onto this list. Here you see a few of the specific impairments that apply to the L.A. River, Ballona Creek, the Long Beach Harbor and Santa Monica Bay.

Southern California's beaches are world class. They are part of our state and national cultural heritage. Millions visit our beaches each year and our coastal economy is valued at over $2 billion each year. Sadly, the value of beaches is best understood when they are no longer available for use. Last year's crisis with the polluted Huntington Beach highlights the serious impacts that stormwater and urban run-off can have on the local economy. People do get ill when they swim in contaminated waters.

Recently the southern California beach crisis has reached such a level of concern that it has reached the editorial page of the newspapers and editorial cartoons.

So do we need to do something to address this problem? Clearly the answer is yes, and I find it lamental that the penalty for being engaged in a dialogue, trying to work with people and trying to find a solution and being open and responsive is

thrown back, taken out of context, and used as a rally device to suggest that our proposal has no credibility.

As you know, the mechanism for addressing the stormwater problem is the Los Angeles County Municipal [11] Stormwater and Urban Run-off Permit. This permit is found (inaudible) contained in the Clean Water Act amendments of 1987 and recognize the need to address stormwater by creating a current process in which each municipality would be obligated to control stormwater pollutants to the maximum extent practicable.

The obligation to address new development is clear and it's a clear requirement of federal law and regulation. We must have a plan in the permit that addresses this topic. The current permit was adopted in 1996 and built on an earlier permit adopted in 1990.

It is now ten years after the first permit was adopted, and the time has clearly arrived for the development community to share in contributing to the solution of stormwater pollution as envisioned by the 1987 Clean Water Act.

Within the findings of Board Order 96-054 is a clear statement of purpose that BMPs be required to be used that reduce pollutants so that the discharge of stormwater will not cause violations of water quality objectives nor create conditions of nuisance. We know that run-off of existing developed areas do not meet this criteria.

Our expectation is that new development will apply mitigation measures to limit the contribution of additional pollutant loadings to the maximum extent practicable. The SUSMP's content is prescribed by the permit which sets clear expectations for what a SUSMP

* * *

[LOGO]
Linda S. Adams
Cal/EPA Secretary

[SEAL]
Arnold Schwarzenegger
Governor

California Regional Water Quality Control Board
Los Angeles Region

320 W. 4th Street, Suite 200, Los Angeles,
California 90013 Phone (213) 576-6600
FAX (213) 576-6640 –
Internet Address: http://www.waterboards.ca.gov/losangeles

April 13, 2009

Mr. William T. Fujioka
Chief Executive Officer
County of Los Angeles
500 West Temple Street, Room 713
Los Angeles, CA 90012

VIA CERTIFIED U.S. MAIL

Ms. Gail Farber, Director
County of Los Angeles
Flood Control District
P.O. Box 1460
Alhambra, CA 91802-1460

VIA CERTIFIED U.S. MAIL

RESPONSE TO RECEIVING WATER LIMITATIONS COMPLIANCE REPORT REQUIREMENTS OF REGIONAL BOARD ORDER NO. 01-182 AS AMENDED BY ORDER NO. R4-2006-0074 AND ORDER NO. R4-2007-0042 (NPDES PERMIT NO. CAS004001, WDID-4B190107101 [Los Angeles County Flood Control District] and 4B190107099 [County of Los Angeles])

(Filed Sep. 8, 2009)

Dear Mr. Fujioka and Ms. Farber:

The California Regional Water Quality Control Board, Los Angeles Region (Regional Water Board) is the state regulatory agency responsible for protecting water quality in Los Angeles and Ventura Counties. To accomplish this, the Regional Water Board issues permits under the National Pollutant Discharge Elimination System (NPDES) as authorized by the federal Clean Water Act. On December 13, 2001, this Regional Water Board adopted the Los Angeles County Municipal Separate Storm Sewer System Permit, NPDES Permit No. CAS004001, Order No. 01-182 (LA MS4 Permit), under which both the County of Los Angeles and the Los Angeles County Flood Control District are Permittees. The LA MS4 Permit was subsequently amended on September 14, 2006 by Order No. R4-2006-0074 and on August 9, 2007 by Order No. R4-2007-0042.

BACKGROUND

The LA MS4 Permit includes Discharge Prohibitions, Receiving Water Limitations, and a Monitoring and

Reporting Program, among other requirements. Under Part 2, Receiving Water Limitations, the LA MS4 Permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives."

Under the LA MS4 Permit's Receiving Water Limitations section, the Permittee(s) are required to submit a Receiving Water Limitations Compliance Report when exceedances of water quality standards occur and begin the iterative process of eliminating the exceedances. The iterative process as written in the LA MS4 Permit requires the Permittees to notify the Regional Water Board of a violation of any Receiving Water Limitation and prepare a plan with dates for implementation and submit to the Regional Water Board Executive Officer for approval. After approval, the Permittee(s) shall implement the proposed additional controls. If such controls fail to prevent further violations, an updated report and plan would be submitted to the Regional Water Board Executive Officer for approval. The plans do not need to be resubmitted during the period if the Permittee(s) are implementing the measures in their Executive Officer approved Receiving Water Limitations Compliance Report according to the approved schedule.

This letter is to inform you that the County of Los Angeles and the Los Angeles County Flood Control District has not provided all of the elements required in Parts 2.1, 2.2, 2.3, 2.3.a, 2.3.b of the LA MS4 Permit and Section LA.4 of the LA MS4 Permit Monitoring and Reporting Program requirements.

Part 2.3 of the LA MS4 Permit requires that, "*The Permittees shall comply with Part 2.1. and 2.2. through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQMP and its components and other requirements this Order including any modifications. The SQMP and its components shall be designed to achieve compliance with receiving water limitations. If exceedances of Water Quality Objectives or Water Quality Standards (collectively, Water Quality Standards) persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit, the Permittee shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure:*

a) *Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report (as described in the Program Reporting Requirements, Section I of the Monitoring and Reporting Program) to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards. This RWL Compliance Report may*

be incorporated in the annual Storm Water Report and Assessment unless the Regional Board directs an earlier submittal. The RWL Compliance Report shall include an implementation schedule. The Regional Board may require modifications to the RWL Compliance Report.

b) Submit any modifications to the RWL Compliance Report required by the Regional Board within 30 days of notification.

c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required.

d) Implement the revised SQMP and its components and monitoring program according to the approved schedule."

2005-2006

In October of 2006 (2005-2006 Reporting Year) the County of Los Angeles and the Los Angeles County Flood Control District submitted a Receiving Waters Limitations Compliance Report for exceedances of water quality standards for indicator bacteria (including Total Coliform, Fecal Coliform, and Enterococcus) at various shoreline monitoring locations along the Santa Monica Bay for the 2005-2006 reporting year.

2006-2007

In October of 2007 (2006-2007 Reporting Year) the County of Los Angeles and the Los Angeles County Flood Control District submitted a Receiving Waters Limitations Compliance Report for exceedances of water quality standards, including those for indicator bacteria (including Total Coliform, Fecal Coliform, and Enterococcus); Total Aluminum, Total Copper; Total Lead; Total Zinc; Ammonia; and Cyanide at various mass emissions monitoring locations during wet weather in the San Gabriel River, Coyote Creek, Los Angeles River, Dominguez Channel, Ballona Creek, Malibu Creek, and Santa Clara River watersheds. During Dry weather mass emissions monitoring for the same reporting year (2006-2007), the County of Los Angeles and the Los Angeles County Flood Control District reported exceedances of water quality standards for indicator bacteria (including Fecal Coliform, and Enterococcus); Total Copper; Cyanide; Chloride; Ammonia; Sulfate; and Total Dissolved Solids at various mass emissions monitoring locations during dry weather in the San Gabriel River; Coyote Creek; Los Angeles River; Dominguez Channel; Ballona Creek; Malibu Creek; and Santa Clara River watersheds.

2007-2008

In October of 2008 (2007-2008 Reporting Year) the County of Los Angeles and the Los Angeles County Flood Control District submitted a Receiving Waters Limitations Compliance Report for exceedances of

water quality standards including those for indicator bacteria (including Total Coliform, Fecal Coliform, and Enterococcus) in the Santa Monica Bay Shoreline and Marina Del Rey monitoring sites.

In the RWL Compliance Reports submitted with the Annual Program Reports, the County of Los Angeles and Los Angeles Flood Control District refer to the installations of storm drain diversions to the sanitary sewer as likely to eliminate the exceedances. In other areas of the reports, mainly the 2007/2008 Annual Program Report, the County and Flood Control District, instead of providing or proposing changes to the Storm Water Quality Management Plan to eliminate water quality exceedances, the County and Flood Control District state that "there's no evidence that discharges from the County or Flood Control District MS4 are causing or contributing to the violation of an applicable water quality standard" and further, state that "Monitoring data do not demonstrate that the County caused or contributed to the reported exceedances." The County and Flood Control District did not propose any changes to their current program until after the LA MS4 Permit is updated and adopted by the Regional Water Board.

The County of Los Angeles and Flood Control District submittals identified as RWL Compliance Reports did not include:

1. A plan to comply with the RWL (Part 2 of the Order);

2. Proposed changes to the SQMP to eliminate water quality exceedances;

3. Enhanced monitoring to demonstrate compliance; and

4. Results of implementation.

If you have any questions regarding this matter, please contact me directly at (213) 576-6605. This Regional Board's legal counsel Mr. Michael Levy, Esq. may be contacted at (916) 341-5193, or alternatively, your staff may contact Mr. Carlos Urrunaga at (213) 620-2083.

Sincerely,

/s/ [Illegible]
Tracy J. Egoscue
Executive Officer

cc: Michael Levy, Office of Chief Counsel, State Water Resources Control Board

California Environmental Protection Agency

[LOGO] *Recycled Paper*

Our mission is to preserve and enhance the quality of California's water resources for the benefit of present and future generations.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,	)	
Plaintiffs,	)	No. CV 08-01467 AHM (PLAx)
vs.	)	
COUNTY OF LOS ANGELES, et al.,	)	
Defendants.	)	

VOLUME II

Deposition of MARK PESTRELLA, taken on behalf of the Plaintiffs, at 1314 2nd Street, Santa Monica, California, commencing at 9:01 a.m., on June 2, 2009, before Evelyn Mah, CSR No. 4231, RPR.

(Filed Sep. 29, 2009)

* * *

[255] **Q Does the County's MS4 outlet to any tributaries of the Santa Clara River?**

A Same answer.

Q Does the County's MS4 outlet to the San Gabriel River?

A Same answer.

Q Or to any tributaries to the San Gabriel River?

A Same answer.

Q What about Malibu Creek?

A I will give you the same answer.

Q And any tributaries to Malibu Creek?

A Same answer.

Q For all of those answers where you said, "Same answer," are those all things you could verify –

A Yes.

Q – by looking at a map?

A Yes.

Q Are you familiar with the term, "area of special biological significance"?

A Yes, I am.

Q What does that refer to?

A It refers to areas designated under the State's ocean plan as regulated.

Q Regulated in what way?

A By the ocean plan.

[256] **Q Okay. It refers to areas under the ocean plan that are regulated by the ocean plan?**

A Yes.

Q Is there an ASBS within the County of Los Angeles?

A Yes.

Q What is that?

A There is an area that goes beyond Ventura County, but in L.A. County, start at the Ventura County line, proceeds south along the Malibu coastline to, I believe, Point Dume. Is that correct? I can be incorrect about the complete extent of it. And then there's also an ASBS area, my understanding, in the Catalina Island area which is L.A. County.

Q The one along the coastline, not Catalina Island, what is that referred to? What is it called?

A The ASBS?

Q Yes, the ASBS.

A The specific term for that area?

Q Right.

A I don't recall.

Q Do you know the number of it?

A No.

Q If I refer to it as the Mugu Lagoon to Latigo Point ASBS, would you know what I'm talking about?

[257] A Mugu.

Q Is it Mugu?

A Yes.

Q Mugu Lagoon. And how do you say the second part?

A Latigo.

Q Latigo Point ASBS.

A I definitely know what you are talking about.

Q Okay. Even if I don't.

Does the County MS4 outlet to that ASBS?

A I don't know if it directly outlets to the ocean, that area, but it outlets – it does outlet, and those waters may reach the ASBS.

Q And what about the District's MS4? Does that outlet to the –

A Sorry. Excuse me.

Q Yeah.

A Correction. I was answering for District in your question.

Q Okay. So let me just start over with those questions.

A Okay.

Q Does the County MS4 outlet to that ASBS?

A Again, I'm not certain, but I can confirm by looking at mapping.

[258] **Q And what about the District's MS4? Does that outlet to that ASBS?**

A Yes.

Q Do you know how many locations or how many drains for the District's MS4?

A I know it's documented somewhere, but I believe it's in the order of 27 locations.

Q Do you know where Surfrider Beach is?

A Yes.

Q Does the District's MS4 outlet to Surfrider Beach?

A No.

Q Does it outlet to Malibu Creek upstream of Surfrider Beach?

A Yes.

Q Does the County's MS4 outlet to Surfrider Beach?

A No.

Q Does it outlet to any waters upstream of Surfrider Beach?

A Upstream the entire Malibu Creek or –

Q Yes.

A We covered that. I would have to look at mapping to tell you whether it does.

Q Okay. Does County unincorporated land drain to

* * *

[271] A Not comprehensively, but probably gave an idea what we would like to see in the next permit.

Q Let me show you the 2006 report. This was marked yesterday. It's Exhibit 37.

Howard, I have a copy if you don't have it.

MR. GEST: If you have an extra copy, I will let Lauren look at it.

MR. COLANGELO: Sure.

Q Take a look at this document and let me know when you've had a chance to look it over.

A Yes.

Q Look at the first page of Exhibit 37. There's a cover letter to the Regional Board. Do you see that?

A Yes.

Q And in the first paragraph under the subject line, it says, "This ROWD has been

prepared by the Principal Permittee through a stakeholder process."

A Yes.

Q "Principal permittee" refers to the Flood Control District?

A Yes.

Q And you signed this cover letter to the Regional Board?

A Yes, I did.

Q It also says, "The County of Los Angeles and [272] the Los Angeles Flood Control District are signatory to the enclosed ROWD."

Do you see that?

A Yes.

Q What does that mean, "signatory to"?

A Signed on to this ROWD.

Q Okay. Take a look – this is an unnumbered page at the back of the ROWD. The last numbered page is 59, and then there are a handful of tables.

A Okay.

Q Okay. Go to the first page of Table 2. Do you see where I am?

A I knew I brought these for a reason. Okay.

Q Was this table – this table is part of the ROWD; is that right?

A Yes.

Q If you look on the left, there is an entry that says, "Mass Emissions Monitoring."

A Yes.

Q And then there are two rows. One says, "Current Program," and the other says, "Proposed Program."

A Yes.

Q Does "Proposed Program" refer to the program that the principal permittee is putting forward in the [273] **ROWD?**

A That is reflecting – it is a reflection of our suggested changes to the monitoring program.

Q Okay. Now, if you're in the row that says, "Proposed Program," move over three columns. There's a question at the top that says, "Question 3: What is the relative urban runoff contribution to the receiving water problems?"

Do you see that?

A Yes.

Q And the statement for "Proposed Program" in that column says, "This program continues to characterize urban runoff and other flows that pass through the MS4 system.

Other inputs into receiving waters must also be analyzed in order to use this program to evaluate relative contributions from the MS4 system."

Do you see that?

A Yes.

Q So in what way does the mass emissions monitoring characterize urban runoff and other flows that pass through the MS4 system?

A It's a montage of information, not very discrete, and it's – we call it urban slobber. I'm not sure where it's from or who put it in the system, but [274] it's ending up at the base.

Q Does it include runoff or other flows from the District's MS4 system, the measuring?

A From?

Q Yes.

A No. It includes flows from the watershed that enter into our system and eventually end up at the base of the watershed.

Q Okay.

A Sometimes in our system.

Q Sometimes in your system?

A Yes.

Q Okay. Does it include conveyances that outlet from the District's MS4 system?

MR. GEST: I will object that it's vague and ambiguous.

THE DEPONENT: Drainage doesn't get generated in a pipe.

Q BY MR. COLANGELO: I understand that. I'm asking if the measuring – if the monitoring at the downstream mass emissions station is characterizing in part what outlets from the District's MS4 system, whether or not it was generated within the District's MS4 system?

A Its – yeah, it's characterizing – it is data [275] from within our system, so it characterizes something that's within our system.

Q You say, "within our system." You mean the District's system?

A Yes.

Q And why is that distinction important?

MR. GEST: Objection. Vague and ambiguous, lacks foundation.

If you understand the question, you can answer it.

Q BY MR. COLANGELO: Do you understand what I'm asking?

A It's important to me as an engineer and someone who is in water quality trying to solve a problem, yeah.

Q I'm sorry. The distinction that you made about it reflecting flows that are entered into the District's system, why is that an important distinction?

A Because flows are generated within our system that don't originate there. They originate within the watershed, and the system drains that watershed. So it's an important distinction in this business as to whether or not you're the plumber or you're actually the generator of the flow.

Q And you are saying the District is the plumber?

A Essentially, yes.

[276] **Q Okay. Where does it drain those flows? Where does the District drain those flows?**

A Where does the watershed flow?

Q No. You said the District just drains flows that are entered into your system from somewhere else. I am asking, where does the District drain those flows?

A Different locations. Some of them characterized at the mass emissions stations.

Q And what I was asking you about is, why is there a distinction between the plumber and – I forget the other term you used. Why is that distinction important?

A In the context of an MS4 permit?

Q Right.

A It's important to know where the pollutant of concern is being generated.

Q You think it is not important to know where the pollutant of concern is being outlet or discharged?

A No, it's important.

Q Why's that important?

A You want to know the impact on the water body receiving those flows.

Q So the District – the District's MS4 has an impact on the water body receiving its flows? Is that what you're saying?

[277] A No.

Q Why not?

A Why not am I saying that?

Q Yes.

A I don't believe it's the District who is generating or causing that concern.

Q Okay. And is that, again, because the District is just a conveyance?

A That's correct.

Q When I asked whether it's important to know where those flows that are generated somewhere else are being conveyed, I understood you to say, yes, because you wanted to know the impact on the receiving waters where those flows are conveyed; is that right?

A It would be important to know, if you're in the water quality business or enforcement, to know what the impact is on the body that you discharge to, yes.

Q Okay. I've asking about the District. Does monitoring at the mass emissions stations reflect discharges in part from the County's MS4 also?

A I don't know.

Q You don't know?

A No.

Q Does the County know?

A I don't know that they would know.

[278] **Q Why wouldn't they know?**

A Because I don't know if the flows came from the County area.

Q Does the County's MS4 outlet upstream of the different mass emissions stations?

A Yes.

Q So why wouldn't you know if flows came from a County area?

A Given the rain event that we are measuring or those flows that – there may not even be a storm event. That storm may not be occurring over a County area, and urban runoff may not be emanating from the County area during the period we are pulling in the sample.

Q So my question was whether the mass emissions stations reflect discharges from the County's MS4?

A Right.

Q Okay. Your answer is you don't know?

A I don't know.

Q What does it depend on?

A Who's draining to the system.

Q So you understand me to be asking – when I say, "reflect discharges from the MS4," you understand me to be asking, who is generating those discharges that enter into a storm drain system somewhere; is that right?

* * *

[283] **assume it's receiving water. Does the District MS4 – you said it depends on the portion of the L.A. River we're talking about. I am talking about the portion upstream of the mass emissions station. Does the District's MS4 outlet to the L.A. River upstream of the mass emissions station?**

A Yes.

Q And what about the Santa Clara River upstream of the mass emissions station?

A That, I'm not sure about.

Q Is that something you could find out?

A Yes.

Q What about the San Gabriel River upstream of the mass emissions station?

A Yes.

Q Yes, it does?

A Yes, it does.

Q And what about Malibu Creek upstream of the mass emissions station?

A Okay. Outlet into an MS4 into a receiving water?

Q Yes. Does the District MS4 outlet to Malibu Creek upstream of the mass emissions station?

A I'm driving up the river right now. I can't think of any infrastructure we own that outlets to [284] Malibu Creek directly, so I'm going to say, no.

Q Does the District MS4 outlet to Malibu Creek tributaries upstream of the mass emissions station?

A Yes.

Q Now, let me ask each of those questions for the County. Does the County's MS4 outlet to Malibu Creek upstream of the mass emissions station?

A Yes.

Q And does it outlet to tributaries to Malibu Creek upstream of the mass emissions station?

A Yes.

Q Does the County MS4 outlet to the Santa Clara River upstream of the mass emission station?

A Yes.

Q What about the San Gabriel river upstream of the mass emissions station?

A Yes.

Q Does the County MS4 outlet to the Los Angeles River upstream of the mass emissions station?

A Hum? Not sure.

Q Is that something you could find out?

A Yes.

Q Okay. So I think the two you said you weren't sure were whether the District MS4 outlets to the Santa Clara River upstream of the mass emissions station and [285] whether the County's MS4 outlets to the Los Angeles River upstream of the mass emissions station. Is that right?

A That's my recollection, yes.

Q Does the County MS4 outlet to tributaries to the Los Angeles River upstream of the mass emissions station?

A I don't know.

Q Is that something you could find out?

A Yes.

Q Does the District MS4 outlet to tributaries to the Santa Clara River upstream of the mass emissions station?

A I don't know.

Q Is that something you could find out?

A Yes.

Q Are you doing okay? Do you want another break?

A I'm good.

MR. GEST: Let's take a break. I could use a break.

MR. COLANGELO: Let's go off the record.

(Recess.)

MR. COLANGELO: Let's go back on.

Can you mark that as Exhibit 41.

(Exhibit 41 was marked for identification.)

Q BY MR. COLANGELO: Take a look at what has been [286] marked Exhibit 41. I will represent this is Attachment T to the MS4 permit. Take your time looking it over.

A Okay.

Q Are you familiar with this document?

A Yes, I am.

Q What is it?

A It is an attachment to Order No. 01-182, "Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles," monitoring program and reporting program.

Q Have you read this before?

A Yes.

Q Turn to Page T-6. Let me ask you, who prepared this document, if you know?

A I don't know.

Q Okay. It's not the County's or the District's document; is that right?

A That's correct.

Q Okay. On Page T-6 – before I get there, do you understand this to be part of the MS4 permit?

A Yes.

Q Okay. On Page T-6, look at Paragraph A, about halfway down the page. It says, "Mass Emissions." Do you see where I am?

* * *

[508] trying to regulate stormwater in general in the United States, is you have storm events that occur uncontrolled, and you're trying to attribute it to a land area. It's not effective, so there really is no controls you can put there.

Q In the County's view, when would you know if the permittees collectively are contributing to exceedances of water quality standards? Under this permit. I'm talking about this permit.

A I don't know.

Q The County doesn't have any position of – regarding what it would take to establish that the permittees are contributing to exceedances of water quality standards?

A That's correct.

MR. GEST: Other than – you are asking now not a legal conclusion?

MR. COLANGELO: No, I'm not asking for a legal conclusion.

Q And what about for an individual permittee? Take the County. What is the County's view about what it would take to show that the County were contributing to exceedances of water quality standards?

MR. GEST: Again, object to the extent you are asking for a legal conclusion or opinion from this [509] witness.

THE DEPONENT: Yeah. I can't make a legal conclusion.

Q BY MR. COLANGELO: I am not asking for your legal conclusion.

A An exceedance – you measure whether we are contributing to an exceedance downstream at a point somewhere downstream within a watershed? In other words, we are a component of a larger watershed, what would it take to know whether or not the County is contributing?

Q I'm talking about, for this permit, what would it take for you to know that the County were contributing to an exceedance of a water quality standard?

A You cannot. It's impossible, in my mind, to know.

Q What about the District?

A District doesn't contribute to exceedances.

Q In your view, then, the District could never be contributing to an exceedance of a water quality standard?

A That's true.

Q Turn back to Page 23 of the permit. Under Paragraph 3(a), take a look at that paragraph, and let [510] **me know if you are familiar with it.**

A Yes, I am.

Q That paragraph requires a permittee to prepare a receiving water limitations compliance report in certain circumstances; is that right?

A Yes.

Q When, in the County's view, is the County required to prepare such a report?

A You know, we've asked the Regional Board since 2001 when we should. We never really got a straight answer. There's a mass confusion about when this should be. I think we were cautionary in the two times that we did submit an RWL, the Flood Control District, but really, to understand when that should

happen, and you can see by record, I don't believe any other permittee – copermittee has submitted an RWL because there's so much confusion about what the hell that language means. I think the Regional Board will tell you the same thing.

Q What's the County's view about when you are required to submit an RWL?

A I don't know that the County ever – strictly speaking, the County would ever submit an RWL given the current construct of this permit.

Q Why?

[511] A Because there's no way to prove that the County caused or contributed to an exceedance at the mass emissions station.

Q So other than for – I forget the word you said – proactive or –

A Cautionary.

Q – cautionary reasons –

A In the interest of water quality improvement.

Q – the County – other than for those reasons, the County wouldn't believe it was required under this permit term to submit an RWL?

A An RWL, in our view, is a method to adjust our stormwater quality management plan in any given year, other than the year you get a new permit.

And so this is sort of an reopener, and so we use it that way to say, "Please be aware we are doing the following, and we would like to change certain things." So it is an opportunity for us to respond to them and ask for an adjustment.

It – the two times that we have submitted an RWL, the Flood Control District submittals, what we basically wanted to do was notify the Board that we think there's a better way to go about a permit and that they should also know there are things happening with respect to the permit that they aren't documenting that

* * *

[620] **standard under the MS4 permit?**

A Yes.

Q What is that based on?

A Well, first, it's the reading of the law. Second, interpretations by local Regional Water Quality Control Board executive director, Jonathan Bishop, at the time, specifically made it known that this is not a water quality standard that the Regional Board is currently or wants to be regulating through MS4 permits.

Q When was that?

A During his tenure and I'm – in the years between 2007 and 2008.

Q It's the County's understanding, then, that the Regional Board does not believe the Ocean Plan Discharge Prohibition to be a water quality standard under the MS4 permit?

A Well, a water quality standard, if that's what it is, to be regulated under a MS4 permit.

Q Right. I asked you yesterday about Part 2.1 of the permit, which says that the permittees can contribute to exceedances of water quality standards. Do you remember that?

A Yes.

Q And I asked what you thought that included, and you said parts of the basin plan, the ocean plan, and [621] **the Cal Toxics Rule. Do you remember that?**

A Yes.

Q But this particular part of the ocean plan, the prohibition against discharges of waste into an ASBS, you don't believe to be a water quality standard for purposes of that part of the permit; is that right?

A That's correct.

Q Is it the County's view the Regional Board thinks the same thing?

MR. GEST: Objection. Asked and answered.

THE DEPONENT: The Regional Board has not only acted that way, they have stated it in so many terms, that that is their understanding as well.

Q BY MR COLANGELO: In writing?

A They don't need to be asked – they haven't probably responded in writing because we never asked for it in writing from them. They are not enforcing this provision or this water quality standard, as you stated it, through their MS4 permit.

Q Enforcement is a different question.

A Understood.

Q Has the Regional Board conveyed to the County in writing or otherwise that the Ocean Plan Waste Discharge Prohibition is not a water quality standard for purposes of Part 2.1 of the permit?

[622] A For all intents and purposes, they acted that way. I don't recall any document where they've written that, but for all intents and purposes, they have acted that way, yes.

Q What is the basis for that answer?

A That they've never brought that standard to bear under our MS4 permit. They've never taken any enforcement action related to it. They continue to state that it is not under their authority here locally to enforce that at this time.

Q Where do they continue to state that?

A In ongoing conversations. They are not involved at all in the – in the determination or in the enforcement or the definition or in any way taken any action locally as a Regional Water Quality Control Board under our MS4 permit to enforce that and, as I stated previously, that it would be adopted into their permit if it was going to be – into this permit if it was going to be a Regional Water Quality Control Board and an MS4 permit issue.

Q Could you explain what you mean by that, that they stated previously that it would be adopted into the permit?

A They said the only way – they stated the only way that they would become involved or the MS4 permit [623] would be used to enforce the ocean plan, this provision of the ocean plan, is if there were a formal action taken by the Regional Board to – or the State Board to place this in NPDES permits.

Q Expressly?

A Expressly.

Q Where did they state that?

A They have told the discharge community that on a number of occasions, whether it was luncheons or workshops or in their actions as a participant in this matter. In fact, we had this matter – the subject matter brought locally here on many occasions in conferences, in professional conferences, where we were discussing a matter – water quality matters, and the State designated State Water Board members

to actually come and express – specifically speak to ocean plan regulation and determinations and definitions, program issues, and the State Water Board has affirmed in those meetings, Urban Water Institute Conference 2007 – Dominic Gregorio was at that meeting – and his stand specifically, this is a State Water Board program that will be deemed developed by the State Water Board, and it is not a – currently an NPDES program.

Q I was asking about the Regional Board. You said the Regional Board has told you that this would not [624] **be considered part of the MS4 permit unless and until it were included expressly.**

A Yes.

Q Where did they tell you that?

A Jonathan Bishop, 2007, Windows Restaurant, downtown Los Angeles, with about seven or eight other discharge agencies –

Q What was – I'm sorry.

A – made the statement that he is not involved in – his agency is not currently involved or are they interested in being involved in the enforcement of that water quality or the ocean plan provisions as part of the NPDES permit.

Q What was Mr. Bishop's title at the time?

A Executive officer, Regional Water Quality Control Board.

Q For the Los Angeles region?

A Yes.

Q Which parts of the ocean plan, in the County's view, are water quality standards for purposes of Part 2.1 of the MS4 permit?

A I'm sorry. The County's view?

Q Yes.

A Applicable water quality standards with respect to the MS4 permit, and we have been given a list of [625] constituents of concern to be measuring for the State Water – for the Regional Water Quality Control Board. And so we look where it's applicable at those three locations that we stated earlier, the ocean plan, the basin plan and the CTR limits, for standards where the Regional Board has not developed an MS4 specific standard for those constituents of concern.

Q Are you referring to numeric standards?

A Yes.

Q Is there someplace in the ocean plan – is there contained a list of what you believe to be the water quality standards from the ocean plan for purposes of Part 2.1 of the permit?

A Yeah. I would have to look at the ocean plan to tell you that.

Q Your testimony, though, is that the only parts of the ocean plan the County believes to be water quality standards under the permit are numeric limitations contained in the ocean plan?

A Or – well, standards that are applicable to the specific constituent of concern that we are reviewing. If it's not in the ocean plan, if there was zero constituents of concern listed there without any numeric limit, we wouldn't need to look at the ocean plan.

[626] **Q So the ocean plan requirements are water quality standards to the extent that they set limits for a particular constituent?**

A That's correct.

Q That's the County's view?

A That's the County's view.

Q Did the County apply to the State Board for an exception to the ASBS waste discharge prohibition?

A Yes, reluctantly.

Q When?

A I don't have a good memory of when exactly it was. It was in response to State Water Board actions so –

Q That's fine. I think the documents show when.

A Yeah.

Q Why do you say, "reluctantly"?

A We at the time didn't believe we needed an exception or couldn't understand what an exception would provide. We believed that we were actually exempt from the provisions.

Q Why?

A Because we didn't believe the provisions applied to stormwater.

Q Why?

A Because stormwater should not be considered a [627] waste.

Q No matter what is in it?

A Stormwater – strictly stormwater should not be considered a waste.

Q Why?

A It isn't a waste.

Q What about what's in it? Are you saying that stormwater, no matter what's in it, should not be considered waste?

A I'm saying the ocean plan has problems with respect to waste, defining waste.

Q What about the answer to my question? Does it matter what's in the stormwater as far as whether the County believes that it is waste?

A Not with respect to these – these provisions of these regulations.

Q What regulations are you referring to?

A Ocean plan – the ocean plan itself.

Q So stormwater, regardless of what it contains, in your view, should not be considered waste?

A What may be in stormwater may be considered waste, but stormwater itself should not be considered a waste.

Q How would you regulate what's in stormwater without regulating the discharge of stormwater?

* * *

[688] **Q BY MR. COLANGELO: What steps does the County take – what specific steps does the County take in response to exceedances that it sees of standards at the mass emissions stations?**

MR. GEST: Objection. Asked and answered.

Counsel, I do believe we went over this yesterday or, if not yesterday, the first day, and I really do believe we have. I'm giving you some leeway, but at

some point, I'm going to ask you not to ask questions that have been asked before.

MR. COLANGELO: Could you read back the question.

(The record was read as follows:

"QUESTION: What steps does the County take – what specific steps does the County take in response to exceedances that it sees of standards at the mass emissions stations?")

Q BY MR. COLANGELO: Could you answer that question?

A The County specifically complies with its permit. Those are the steps that we take.

Q What specific steps?

A Have you read our permit?

Q I have.

A It's gigantic. We continue to audit. We continue to meet the maximum extent – to the maximum [689] extent practical, meeting all the components of our permit.

Q Does the County believe that the mass emission monitoring says anything about whether the County is complying with the permit?

A No.

MR. GEST: Objection. You've answered, but that question has been asked and answered.

MR. COLANGELO: Is the answer, "No"?

A The answer is "No."

Q And if the sampling data at the mass emission stations shows exceedances a hundred or a thousand times the standards, the County believe that that – believes that does not say anything about the County's compliance with the MS4 permit; is that right?

A Correct.

Q What do you think about whether that shows anything about whether any other permittee is in compliance with the permit, detections a thousand times the standard at mass emissions stations of the constituents measured there? Does that say anything to you about whether any other permittee is in compliance with the permit?

A No.

Q Does it say anything to you about whether all [690] of the permittees together, collectively, are in compliance with the permit?

A No.

Q Why not?

A Because it's not a measured compliance for the permit.

Q Why not?

MR. GEST: Objection. Asked and answered.

THE DEPONENT: For all the reasons stated in previous testimony about mass emission sampling.

Q BY MR. COLANGELO: What about all of the monitoring required under the permit? Do you believe that all of the monitoring, the mass emission monitoring, tributary monitoring, shoreline monitoring, can be used to determine the County's compliance with the permit?

A No.

Q Why not?

A You can never do enough monitoring to actually establish that.

Q In the County's view, there is no monitoring required under the permit that establishes whether the County is in compliance or not?

A Correct.

Q What about all permittees together? Is it the [691] **County's view that all of the monitoring required under the permit tells you anything**

about whether the permittees collectively are complying with the permit?

A No.

Q Why not?

A For all the reasons stated about stormwater previously in this testimony.

Q What about the District? Does the District believe that all of the monitoring required under the permit tells you anything about the District's compliance with the permit?

A Other than that the District completes monitoring as required under the permit – physically does the monitoring and meets those requirements of the monitoring, but the results do not tell you anything about the District's compliance.

MR. GEST: It's about 12:00. I don't know if you want to take a break or not.

MR. COLANGELO: Let's go off the record.

(Discussion off the record.)

MR. COLANGELO: Back on.

Q I assume your answer to those questions about mass emission monitoring does not differ depending on which mass emission station we are talking about. Is that right?

[692] A That's correct.

Q Is there any monitoring that you think would allow you to determine whether the County is in compliance with the water quality standards in the permit?

A It's a in – the County is in compliance with the water quality standards of the permit?

Q Right. Part 2.1 of the permit says, "permittees may not cause or contribute to exceedances"; right?

A Yes.

Q Do you think there is any monitoring that would show you whether the County is in compliance with that part of the permit?

A Determining the – you know, to me, it's too complex of a system to say any one monitoring of any kind will tell you compliance. It may be representative of something, but it's not – it's been debated and actually been argued in Ventura whether or not you can ever show compliance with the permit.

Q What's the County's view?

A County doesn't believe that monitoring will ever show strict compliance with the permit.

Q That any monitoring will ever –

A Correct.

[693] **Q – show that?**

A That's correct. I'm sorry.

Q What about for all of the copermittees together? Do you believe that any monitoring will ever show you whether the system as a whole is contributing to exceedances of water quality standards?

A The system?

Q Yes. The whole MS4.

A There is no way that you can efficiently measure the whole MS4, so no.

Q Why do you say that?

A Because the MS4 is a complex series of drainage systems, open channel and otherwise that is not captured at one given point or another and so monitoring – I can't envision a monitoring plan that would tell you whether or not the overall MS4 system is in compliance or meets some standard.

Q What about for certain parts of the system? Can you imagine certain components of the system where monitoring will tell you whether the system is in compliance?

A The system itself does not need to be in compliance, the MS4 system.

Q And you already answered that you can't envision any monitoring that will tell you whether any [694] **of the permittees are in compliance?**

A That's correct.

Q I'm sorry. I think I was speaking over you.

A That's correct.

MR. COLANGELO: All I have left, I think, are the questions from the first day.

MR. GEST: Let's take a break then.

MR. COLANGELO: That's fine. Let's go off the record.

(Recess.)

MR. COLANGELO: Let's go back on the record.

Q Does the District's MS4 outlet to the Santa Clara River upstream of the mass emissions station?

A Yes.

Q Does the District's MS4 outlet to any tributaries to the Santa Clara River?

A Yes.

Q Does the District's MS4 outlet to tributaries to the Santa Clara River upstream of the mass emissions station?

A Yes.

Q What is the location of the Santa Clara River mass emissions station with respect to the District's MS4?

A The nearest drain is about a mile north of the [695] mass emissions station.

Q The nearest –

A Connection.

Q – district connection is a mile north?

A Yes.

Q Is the Santa Clara River mass emissions station within the Flood Control District system?

A No.

Q So in that way, it is distinct from the San Gabriel River and the Los Angeles River mass emissions stations; is that right?

A That's correct.

Q Does the detection of a constituent at the Santa Clara River mass emissions station reflect a conveyance of that constituent in stormwater from the District's MS4?

A I don't know.

Q Does the District know?

A No.

Q Why not?

A Can't be certain if the flows that are measured are actually from the MS4.

Q Does the District's MS4 system outlet to portions of the San Gabriel River?

A Yes.

[696] **Q What portions of the San Gabriel River are maintained and operated by the Flood Control District?**

A Over 90 percent of San Gabriel is maintained and operated by the Flood Control District. There are portions that are maintained by the Army Corps of Engineers.

Q Does the District's MS4 outlet to any tributaries to the San Gabriel River?

A Yes.

Q Does the District's MS4 outlet to Malibu Creek?

A Yes.

Q Did the County have some difficulty identifying where its – I'm talking about the County now. Did the County have difficulty identifying where its storm drains or its MS4 system outlet?

A Because of the complex nature of the MS4 system, yes.

Q Why?

A Because it's – it's a – that system is made up of a series of different types of infrastructure owned by different entities within the County.

Q And –

A So it's not as distinct and centralized as the information from the Flood Control District.

Q Does the County's MS4 outlet to the Los Angeles [697] **River?**

A No.

MR. COLANGELO: Let's go off the record for a second.

(Discussion off the record.)

MR. COLANGELO: Back on the record.

Q Does the County's MS4 outlet to any tributaries of the Los Angeles River?

A Yes.

Q Does it outlet to tributaries of the Los Angeles River upstream of the mass emissions station?

A Yes.

Q Does the County's MS4 outlet to the Santa Clara River?

A Yes.

Q Does the County's MS4 outlet to any tributaries of the Santa Clara River?

A Yes.

Q Does the County's MS4 outlet to the Santa Clara River upstream of the mass emissions station?

A Yes.

Q Does it outlet to tributaries of the Santa Clara River upstream of the mass emissions station?

A Yes.

[698] **Q Does the County's MS4 outlet to the San Gabriel River?**

A Yes.

Q Does the County's MS4 outlet to tributaries to the San Gabriel River?

A Yes.

Q Does it outlet to the San Gabriel River upstream of the mass emissions station?

A Yes.

Q Does the County's MS4 outlet to the San Gabriel River tributaries upstream of the mass emissions station?

A Yes.

Q Does the County's MS4 outlet to Malibu Creek?

A Yes.

Q Upstream of the mass emissions station?

A Yes.

Q Does the County's MS4 outlet to tributaries to Malibu Creek?

A Yes.

Q Upstream of the mass emissions station?

A Yes.

Q We talked about six tributary monitoring locations within the Los Angeles River that – where monitoring was conducted pursuant to the permit. Do you [699] **remember that?**

A Yes.

Q I will ask about each of those six. Is the tributary monitoring location for Aliso Creek within the portion of that tributary that's owned or operated by the District?

A Yes.

Q What about the monitoring location for Bull Creek? Is that within the portion of that tributary owned or operated by the Flood Control District?

A Yes.

Q What about the Arroyo Seco Channel? Same question.

A No.

Q What about Rio Hondo Channel? Same question.

A Yes.

Q What about Burbank Western Channel? Same question.

A Yes.

Q And Verdugo Wash? Same question.

A Yes.

Q For the ones where you said, "Yes," those monitoring locations are within the portions of those tributaries owned by the Flood Control District?

A Correct.

* * *

SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF LOS ANGELES – CENTRAL CIVIL WEST COURTHOUSE

In Re LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT LIGITATION [sic]	Lead Case No. **BS 080548** Related Cases: BS 080753, BS 080758 BS 080791, BS 080792, and 080807 Judge: Hon. Victoria Gerrard Chaney-D. 324 STATEMENT OF DECISION FROM PHASE II TRIAL ON PETITIONS FOR WRIT OF MANDATE (Filed Sep. 28, 2009) Hearing: January 7, 2005 Time: 1:30 p.m. Department: 324-Central Civil West Date Actions Filed: January 15 & 17, 2003 Ruling: March 16, 2005

PROCEDURAL HISTORY

This case, known as *In the Matter of the Los Angeles County Municipal Stormwater Permit,* arises from six coordinated Petitions for Writ of Mandate filed in January 2003 by the *Arcadia* Petitioners, *County* Petitioners, *Alhambra, LAEDC* Petitioners, *Monrovia* Petitioners and the City of Los Angeles against the State Water Resources Control Board

(State Board) and the Regional Water Quality Control Board, Los Angeles Region (Regional Board).

* * *

Therefore, as to Issue One, the Court finds that the Petitioners failed to carry their burden, and respectfully declines to grant the request for a writ.

ISSUE TWO

Petitioners challenge the Permit's monitoring and inspection requirements. The Court finds that the challenged requirements are substantially similar to what the permittees proposed in their application for the Permit, the Report of Waste Discharge (ROWD). As part of the ROWD, the permittees, including Petitioners, submitted a monitoring and reporting program. (AR 6, 55, 5341; Permit at p. T-3.) The Court finds that for those Petitioners who were part of the joint ROWD submission, the doctrines of estoppel and waiver apply.

In addition, the Clean Water Act requires monitoring and reporting in order to discharge pollutants into storm sewer systems. (See 33 U.S.C. § 1318, subd. (a).) Federal regulations mandate substantive requirements for all NPDES permits under Code of Federal Regulations, title 40, sections 122.48 and 122.41, subdivisions (j)-(l), which require recording and reporting of monitoring results. Section 122.26 of that title requires inspection and monitoring. (40 C.F.R. § 122.26.) At its subdivision (f), it requires, in

part: "Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions." (40 C.F.R. § 122.26, subds. (d)(2)(i)(F) & (d)(2)(iii)(D).) Thus, the federal authority mandates that the Regional Board require a monitoring and reporting program, and the federal authority does not suggest or require an additional cost benefit analysis in imposing the monitoring and reporting program.

In California, the Porter-Cologne Act contains a special chapter, Chapter 5.5, that addresses Clean Water Act permits. As part of this Chapter, Water Code section 13383 governs monitoring and reporting requirements. Section 13383, like the federal Clean Water Act, does not mention or suggest or require that a cost benefit analysis be done in this setting.

The Court disagrees with Petitioners' interpretation of the Porter-Cologne Act, and finds Water Code sections 13225 and 13267 do not apply to the present situation. Instead, Water Code section 13383 governs the permitting process here. As noted in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the Court held, in part: "state law is still preempted . . . where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (464 U.S. at p. 248.) Applying Water Code sections 13225 and 13267 would stand, in the words of *Silkwood* as: "an obstacle to the accomplishment of the full purposes and objectives of [the federal law]." (*Ibid.*; see also Wat. Code, §§ 13370, 13377.) The Court refers to its prior citations, regarding the full

purposes and objectives of the Clean Water Act and permits such as the one challenged here.

Even if the Regional Board was required to consider the costs and benefits of the Permit, there is substantial evidence in the Record of this consideration. (See, e.g., Permit p. 5; AR 1291, 1541, 1988, 1999, 2776, 2882, 6611 [documenting Regional Board meetings]; 8078, 8080 [discussion of effectiveness in Fact Sheet]; 2884, 2886, 2778, 20765, 32490, 45329, 47928, 48306.)

The Court finds that Petitioners' objections to the Permit's trash monitoring requirements to be without support. Trash monitoring was already developed and mandated under a separate Regional Board order. The Permit in this case attempts to be consistent with the trash TMDL. (AR 7973.) The Regional Board did examine the costs and compared the benefits for trash monitoring. For example, the Regional Board modified the monitoring requirement for unimpaired watersheds to eliminate trash sampling and requires only photographic evidence. (AR 79595.)

Therefore, as to Issue Two, the Court finds that the Petitioners failed to carry their burden, and respectfully declines to grant the request for a writ.

* * *

failure to do that here does not negate the Permit and is not sufficient for the Court to remand the Permit for re-hearing.

Finally, the Court finds that there was substantial compliance with the administrative hearing requirements and due process requirements. (See *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1011; *Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1327-1328; *Southern Pac. Transportation Co. v. State Bd. of Equalization* (1985) 175 Cal.App.3d 438, 442.) There was the opportunity for substantial written comment by the municipalities. Petitioners considered their comment letters and documents to be part of the Record and as an opportunity to comment in lieu of oral comment time before the Regional Board. (AR 7900, 7829, 7887-7888.)

The Court is not satisfied that, had the Regional Board provided better notice or more time for comment, that the outcome would have been different, despite numerous requests of this Court to the Petitioners in that regard. (See *NRDC v. USEPA* (9th Cir. 2002) 279 F.3d 1180, 1186; *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832, 851.) In addition, at trial, counsel for the Regional Board presented various drafts of the Permit, which demonstrated that the requirements regarding TMDLs and the one-business day inspection were logical outgrowths of these previous drafts and, in some cases, arose in response to comments. (See, e.g. AR 5110-5127, 5143-5144, 6468, 6479-6480, 6508, 6568, 7285; Permit pp. 27-34, 48-49.) Therefore, the Court cannot find that there was prejudice to the Petitioners.

IT IS SO ORDERED.

Dated: March ~~16~~ 24, 2005

/s/ Victoria G. Chaney
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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SANTA MONICA BAYKEEPER and NATURAL RESOURCES DEFENSE COUNCIL, **Plaintiffs,** **v.** **CITY OF MALIBU,** **Defendant.**	Case No.: CV 08-1465-AHM (PLAx) **BRIEF OF AMICUS CURIAE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

(Filed Feb. 3, 2010)

Date: February 22, 2010
Time: 10:00 a.m.
Place: Courtroom 14
Judge: Honorable A. Howard Matz

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[1] INTRODUCTION

The California Regional Water Quality Control Board, Los Angeles Region (Regional Board) is filing this amicus curiae brief to address issues regarding the interpretation of the Los Angeles County Municipal Storm Water National Pollutant Discharge Elimination System (NPDES) Permit (the Permit), which the Regional Board issued and implements.[1] The Regional Board is concerned that Defendant City of Malibu (the City) has taken positions that are inconsistent with the Permit as adopted, interpreted, and implemented by the Regional Board.[2]

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[1] Issued in 2001, the Permit was Regional Board Order No. 01-182. It has been amended twice.

[2] Timing considerations have precluded the Regional Board from filing an amicus brief in the companion case, *NRDC et al v.*

(Continued on following page)

The Regional Board submits this brief because the Permit is critical to the Board's efforts to protect water quality in the Los Angeles Region. Storm water and urban runoff are among the principal threats to water quality in the region. See Regional Board's Request for Judicial Notice (RB RJN), Exhibit A, Permit, at pp. 5-6 ¶ B.1 to B.6. NPDES permits, such as the Permit, bridge the gap between water quality and regulatory requirements. The Supreme Court has described NPDES permits as serving "to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations . . . of the individual discharger." *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.* 426 U.S. 200, 205, 96 S.Ct. 2022, 2025 (1976); *see also* Cal.Wat. Code, § 13370. Here, the Permit "transforms" the water quality standards specified in the Los Angeles Basin Plan (*see* California Water Code section 13240) and the California Ocean Plan (*id.* at section 13170.2) into compliance obligations of the City and other co-permittees.

[2] Ironically, by invoking the "permit as shield" doctrine, the City itself demonstrates the importance of interpreting the Permit in a manner that preserves its enforceability in both this action and

---

County of Los Angeles, et al, Case Number 08-1467-AHM (PLAx), where many of the same issues appear. The Court may consider the positions conveyed here in the companion case.

administrative actions before the Regional Board.[3] The permit shield provision states that for purposes of enforcement, compliance with an NDPES permit is deemed compliance with sections of the Clean Water Act upon which those provisions are based. 33 U.S.C. § 1342(k). But "compliance" means compliance with the entire Permit. It is not the case that there is a one-to-one correlation between statutory requirements and permit provisions such that a permittee can insulate itself from direct liability under the statute by complying with selected permit provisions. Any regulatory permit, particularly one as necessarily complex as a system-wide municipal separate storm sewer system (MS4) permit, represents an overall approach to the problem.

This brief discusses three aspects of the Permit put at risk and potentially nullified by the City's positions in this litigation. First, the Permit's prohibition of discharges that cause or contribute to an

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[3] City's Response to Plaintiff's MSJ at 5, fn. 7. The permit shield provision can be overstated, however, as it does not shield a permittee from all claims that the permittee has violated the Clean Water Act. Nor does the provision mean that compliance with part of the permit means compliance with the whole permit, or that "good faith" is a factor in determining permit violations. It certainly does not mean that if a permittee argues that it has no legal duty to comply, it can use its possession of a permit to avoid liability. Instead, if polluters subject to other sections (33 U.S.C. §§ 1311, 1312, 1316, 1317 and 1343) have a permit issued under section 1342, then compliance with the 1342 permit shall be deemed compliance with those other sections. (64 Fed.Reg. 68,722, 68,770 (Dec. 8, 1999).)

exceedance is an enforceable Permit requirement. There is no "safe harbor" provision allowing permittees to escape liability with partial compliance. Second, the Permit envisions a system of self-monitoring and reporting: the permittees must identify an exceedance or other [3] violation, and then take corrective action. Because there are multiple permittees, they must work collaboratively to determine which permittees are causing or contributing to the exceedance. It does not fall to the Regional Board, the United States Environmental Protection Agency (U.S. EPA) or citizens to investigate all potential causes of pollution before any individual permittee's obligations begin. Third, the provisions of the Ocean Plan, including its discharge prohibition, like the provisions of any other Water Quality Control Plan, are incorporated into and enforceable through the Permit.

ARGUMENT

I. THE COURT SHOULD NOT REFRAIN FROM ADJUDICATING THESE MATTERS BASED UPON THE LOS ANGELES SUPERIOR COURT'S DECEMBER 24, 2009 STAY OF CERTAIN PERMIT PROVISIONS.

The Regional Board disagrees with the stay issued by the Los Angeles Superior Court on December 24, 2009 and will vigorously defend the Permit modifications that are the subject of the Superior Court litigation. The court's stay affects only a few provisions of the Permit that are the subject of this citizen suit, and only until June 2, 2010. Even with

respect to those few provisions, the Regional Board contends that violations of the Permit predating the stay are still enforceable.

II. VIOLATIONS OF WATER QUALITY STANDARDS ARE VIOLATIONS OF THE PERMIT.

The Regional Board disagrees with the City's contention that compliance with the Permit's "iterative process" satisfies all the Permit's water quality standards requirements. In particular, the City argues that if it is complying with the "iterative process," it is fully complying with the Permit and cannot be held liable for any exceedances of water quality standards. *See, e.g.* City's P&As in Support of Motion for Judgment on the Pleadings and Cross-Motion for Summary [4] Judgment, at 12-14, 4:19-20, and 5:6-9; 23-24; *see also* City's Response to Plaintiff's Motion for Summary Judgment at 10.

A. Parts 2.1 and 2.2 Require Compliance with Water Quality Standards And Are Enforceable.

The Regional Board issued the Permit as required by the Clean Water Act. *See* 33 U.S.C. § 1342(p)(3). As part of issuing the Permit, the Regional Board considered tens of thousands of pages of reports and data and concluded that municipal storm water discharges are the principal cause of beach closures and water quality impairments. RB RJN, Exhibit A, at 3-7. The Regional Board considered the

record and, exercising its authority under Section 402(p)(3)(B)(iii), included permit provisions to prevent MS4 discharges that cause of [sic] contribute to exceedances of water quality standards. *See* 33 U.S.C. § 1342(p)(3)(B)(iii); *see also County of Los Angeles v. California State Water Resources Control Bd.*, 143 Cal.App.4th 985 (2006). To this end, the Permit provides:

> 1. Except as provided in Part 2.5 and 2.6 below, discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited.
>
> 2. Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance.

Exhibit A at 25, Part 2 ("Receiving Water Limitations").

The plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a "violation of Water Quality Standards" or to a condition of nuisance. The only "exceptions" concern even more explicit requirements provided in Parts 2.5 and 2.6 for protecting certain beaches during the summer dry weather months.[4] As Permit requirements, these

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[4] Those "exceptions" are the subject of the Los Angeles Superior Court's stay, issued on December 24, 2009. To the extent those newer provisions are stayed after December 24,

(Continued on following page)

provisions are separately enforceable from [5] other programs outlined within the Permit. *See* 40 C.F.R. § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action.")

In 2001, precisely because they understood Parts 2.1 and 2.2, the permittees filed administrative and judicial challenges to the Permit. The permittees claimed then that they could not comply with what they now argue the Permit does not mean. *See County of Los Angeles, supra,* 143 Cal.App.4th at 985. The Los Angeles Superior Court and the California Court of Appeal upheld the Permit, the permittees' concerns about Parts 2.1 and 2.2 notwithstanding. In response, the County of Los Angeles and Los Angeles County Flood Control District (the Principal Permittee for the Permit) summarized the Permit in a petition for review to the California Supreme Court, "[A]ccording to the Regional Board, the County must comply with Parts 2.1 and 2.2[.]" *See* RB RJN, Exhibit G, County's Petition for Review at 257. Further, the County entities argued that "[t]he Regional Board adopted a Permit requiring compliance with those water quality standards, terms that were 'absolute and unconditioned.' The Court of Appeal erred in not holding such action to be an abuse of discretion." *Id.* at 258. The Supreme Court declined to review the Court of Appeal's decision

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2009, then what remains are the general, pre-existing prohibitions of Parts 2.1 and 2.2.

upholding the Permit and rejecting the Permittees' pointed challenge to Parts 2.1 and 2.2. Clearly, the permittees did not believe they had prevailed on their claims that Parts 2.1 and 2.2 cannot stand alone.

Despite this prior acknowledgement by the permittees, the City now asserts that Parts 2.1 and 2.2 of the Permit cannot be enforced separately from the iterative process provisions that begin with Part 2.3. *See, e.g.* City's P&As in Support of Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment at 4:19-20. The City's contention is contradicted by both the plain meaning of the Permit and the Principal Permittee's previous position. Further, the City's own papers demonstrate that even *if* it was complying with the "iterative process," this has not been enough to eliminate discharges of pollutants. *See, e.g.* Thorsen [6] Declaration in Support of City's Motion for Judgment on the Pleadings and Cross Motion for Summary Judgment, Exhibit A at 15 (claiming 160 violations of dry-weather fecal indicator bacteria limits in the period 2008-2009).

B. Reviewing Courts Have Concured that Parts 2.1 and 2.2 of the Permit are Enforceable.

The argument, made by the City and others that Congress intended to prohibit implementing agencies from requiring MS4 dischargers to "strictly comply with promulgated water quality standards" has been rejected by several courts, including the decisions

relied upon by the City. City's P&As in Support of Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment at 12-14.

As addressed above, in their judicial challenges to the Permit, the permittees articulated the very interpretations of the Permit the City now attacks. They presented that theory as overreaching by the Regional Board. The reviewing courts, however, neither rejected the Regional Board's interpretation nor overturned the Permit.

At the time the permittees brought their challenge to the 2001 version of the Permit, the principal case arguably on point was *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1165 (9th Cir. 1999), upon which the City continues to rely. *Defenders,* however, held that while "Congress did not require municipal storm-sewer discharges to comply strictly with" water quality standards, "the [U.S. EPA] has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." 191 F.3d at 1166. The latter holding, although arguably dicta, undermines any contention, in this judicial circuit, that Congress intended to prohibit U.S. EPA or state authorities from requiring MS4 owners and operators to comply with water quality standards.

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board,* 124 Cal.App.4th 866 (2004) (*BIA*), the California Court of Appeal reviewed an MS4 permit issued

by the California Regional Water [7] Quality Control Board, San Diego Region. The permit included terms similar to the Permit in question here. It prohibited the discharge of pollutants that caused or contributed to exceedances of receiving water objectives and/or caused or contributed to the violation of water quality standards and included an iterative process for responding to violations of water quality standards. *Id.* at 876-77. The issue on appeal was "narrow": whether a regulatory agency could prohibit discharges that caused or contributed to exceedances of water quality standards, or whether the "maximum extent practicable" standard was the limit of permit controls. *Id.* at 880.

The *BIA* court noted that Congress and the courts had long held that agencies should use water quality standards to supplement, not supplant, effluent limitations and conditions to prevent water quality from declining. *BIA,* 124 Cal.App.4th at 883-884 (citing *Environmental Protection Agency v. State Water Resources Control Bd., supra,* 426 U.S. at 205 fn. 12; *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700, 715; *Northwest Environmental Advocates v. Portland,* 56 F.3d 979, 987 (9th Cir. 1995). Municipal permits, too, were intended to strengthen, not weaken, the Clean Water Act in this regard. *BIA,* at 884. The *BIA* court upheld the permit's inclusion of prohibitory receiving waters language, in addition to provisions requiring controls to the maximum extent practicable. *Id.* at 885-886. It found that *Defenders* agreed with this approach. *Id.*

at 886-887. "Although dicta, this conclusion reached by a federal court interpreting federal law is persuasive and is consistent with our independent analysis of the statutory language." *Ibid.*; *see also, City of Rancho Cucamonga v. Regional Water Quality Control Board – Santa Ana Region,* 135 Cal.App.4th 1377, 1388-1389 (2006) (citing *BIA* to find that Water Boards are not limited to "maximum extent practicable" standard in MS4 permits, but may require compliance with water quality standards).

[8] C. The Permit Does Not Include a Safe Harbor or "Good Faith" Exception to Permit Compliance.

Permittees would like to read a "safe harbor" into the Permit: if a permittee was in compliance with the iterative process specified in Sections 2.3 and 2.4 of the Permit, it would be in compliance with the Permit, regardless of whether water quality standards are met. *See, e.g,* City's P&As in Support of Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment at 12-14; City's Response to Plaintiff's MSJ at 10. In other words, if a permittee is *trying* to meet water quality standards, it would be the same as meeting them. The Regional Board did not include a safe harbor in the Permit and, under California law, could not have done so. Further, the City now makes the same argument rejected in the permittees' challenge to the 2001 Permit.

In 1998, the State Water Resources Control Board (State Board) did, in fact, approve an MS4 permit with the type of "safe harbor" provision the City wants to read into the Permit. RB RJN, Exhibit E, State Board WQ Order 98-01, at 219. The permit in question included the following language: "The permittees will not be in violation of this provision so long as they are in compliance with [the iterative process set forth in the permit]." *Ibid.*

The U.S. EPA, however, objected to that safe harbor provision and issued its own permit, in effect mooting the state-issued permit. RB RJN, Exhibit F, State Board Order 99-05, at 229. In this manner, U.S. EPA supplanted three state-issued permits containing the improper safe harbor provision. *Ibid.* The State Board, in turn, issued a new Water Quality Order, amending its prior order, and directing the Regional Boards to include the language devised by EPA – with no safe harbor provision – in all future MS4 permits. The State Board specifically invoked its authority to issue precedential, *i.e.* binding, decisions. *Id.* at 230. (In Resolution 96-01, the State Board exercised its authority under Government Code section [9] 11425.60 to designate its water quality orders, such as State Board Order WQ 99-05 as precedential.)

Notwithstanding the directives from the State Board and U.S. EPA, in 2001, the City and other permittees included a safe harbor provision in their MS4 permit application to the Regional Board. RB RJN, Exhibit D, Report of Waste Discharge for

Municipal Stormwater and Urban Runoff Discharges in the County of Los Angeles (Order No. 96-054, NPDES No. CAS614001). The permittees proposed that the provision read as follows: "Timely and complete implementation by a Permittees(s) [sic] of the stormwater management programs prescribed in this Order shall satisfy the requirements of this section and constitute compliance with receiving water limitations." *Id.* at 159.)

As required by State Board Order 99-05, the Regional Board did not include the safe harbor provision in the final permit. RB RJN, Exhibit A, at 23-24 & 14, ¶ 24 (intending the Permit's receiving waters limitations language to be consistent with State Board Water Quality Order 99-05 and *Defenders of Wildlife.*) The Regional Board's position then, as now, is that the Permit cannot be read so as to excuse exceedances of water quality standards. A permittee cannot shield itself from liability for causing exceedances of water quality standards simply by invoking the iterative process. The permittees are well aware of this fact.

The permittees have already complained that the Court of Appeal has upheld the Regional Board's decision to omit a safe harbor provision from the Permit. In its petition for review with the California Supreme Court, the Principal Permittee equated the absence of a safe harbor with going beyond what it contended was the Congressionally mandated Maximum Extent Practicable standard (MEP). It argued that the Court of Appeal had erred by allowing the

Regional Board to require the "impossible" by requiring compliance with Parts 2.1 and 2.2 and not be limited to the MEP standard. RB RJN, Exhibit E, at 226. As has been noted, despite these arguments, the Supreme Court denied review. The permittees' petition to the [10] Supreme Court, and their arguments in support of that petition, eviscerate the City's claim that any court has read a "safe harbor" into the Permit.

In sum, the iterative process is a means of addressing violations, not a defense to them. The process requires a permittee to identify violations and correct them. It requires a permittee to assess the inadequacy of its best management practices and develop new measures. The provisions also allow the Regional Board to assess a permittee's best management practices and determine whether to require further, specific, actions to resolve the violations. Information gathered through a permittee's self-evaluation and reporting process may also assist the Regional Board in determining whether penalties or other enforcement actions are required. Nothing within the Permit, however, limits the Regional Board's enforcement authority to only require permittees to engage in this iterative process or its ability to enforce the prohibitions of Parts 2.1 and 2.2 directly. *See also City of Rancho Cucamonga, supra,* 135 Cal.App.4th at 1388 (holding that there is no statutory right to a safe harbor provision stating that a permittee is in compliance with its permit if in full

compliance with the terms and conditions of its permit).

III. Permittees Are Responsible for Discharges From Their Storm Sewers; Requiring the Regional Board to Disentangle Permittees' Collective Reporting and Discharges Would Render the Permit Virtually Unenforceable

The City takes the position that the plaintiffs have not met their burden of showing that the City in particular is liable for the exceedances observed adjacent to the City's discharges. *See* City's Response to Plaintiff's MSJ at 9, 12. It suggests that until there is a formal determination that the *City* is responsible for discharges that cause or contribute to the exceedance of water quality standards, it need not examine monitoring data, inspect its own discharges, or determine whether it is responsible for poisoning receiving waters with bacteria, toxic metals, sediment or other pollutants. City's P&As in Support of Motion for Judgment on the Pleadings [11] and Cross-Motion for Summary Judgment at 24; *see also* City's Response to Plaintiff's MSJ at 17. Again, the Regional Board disagrees.

A. The Permit Prohibits Violations of Water Quality Standards, but also Requires the City to Identify and Correct Discharges that Cause or Contribute to Exceedances of Water Quality Standards.

The Permit makes the permittees responsible for complying with water quality standards. RB RJN, Exhibit A, at 25, Part 2.1. The Permit requires the permittees, including the City, to develop a program "designed to achieve compliance with receiving water limitations." RB RJN, Exhibit A at 25, Part 2.3. Further, the Permit specifies that:

> If exceedances of Water Quality Objectives or Water Quality Standards (collectively Water Quality Standards) persist, notwithstanding implementation of the [Storm Water Quality Management Plan] and its components and other requirements of this permit, *the Permittee shall assure* compliance with discharge prohibitions and receiving water limitations.

Ibid. (emphasis added). The Regional Board squarely placed upon the *permittees* the responsibility for assuring compliance. The City's arguments are wrong because they shift that responsibility away from the permittees.

In further discussing the permittees' responsibilities, Part 2.3.a grants the Regional Board the authority to trigger the iterative process, but this does not erode the permittees' responsibilities in the first

instance. Part 2.3.a specificies that "[u]pon a determination *by either* the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard," the permittee shall undertake a further sequence of actions designed to bring the permittee into compliance with the prohibitions. RB RJN, Exhibit A, at 25, Part 2.3.a (emphasis added). First, this language must be read in the context of Part 2.3, which places responsibility on the permittees for assuring compliance. Nothing in Part 2.3.a diminishes the City's obligation to assure compliance with water quality standards. Second, the language merely ensures that [12] *in addition* to the City's obligation to identify exceedances and direct the permittees to take further actions, the Regional Board can determine that there are exceedances and direct the permittees to take further actions. This makes perfect sense. The agency primarily responsible for enforcing the Clean Water Act in the Los Angeles Region can force the permittees to comply with the Permit. As discussed in greater detail below, Part 2.3.a cannot be read to excuse the City from making the required determination and assuring compliance with water quality standards.

B. The Monitoring and Self-Reporting Provisions of the Permit Place the Burden on Permittees to Respond to an Exceedance of Water Quality Standards; They Cannot Wait For A Formal Determination of Liability before Self-Reporting and Analysis Begins.

While the City relies upon its alleged "good faith" compliance with the iterative process, it also argues that these Permit provisions are triggered only upon a formal request by the Regional Board. City's P&As in Support of Motion for Judgment on the Pleadings and Cross-Motion for Summary Judgment at 5:6-9 & 23-24. The error in the City's arguments is best understood by starting with the Clean Water Act's fundamental premise: no one may discharge pollutants from a point source. 33 U.S.C. § 1311(a). This prohibition is the cornerstone of the Act. The only means to avoid the total prohibition is to possess a permit issued under the NPDES program. 33 U.S.C. §§ 1311(a); 1342. Permits are intended to impose effective enough controls upon dischargers that they may be allowed to discharge, rather than be held to account under the total prohibition. *See Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1375 (D.C. Cir. 1977) (noting that a permitting agency has discretion to issue a permit or leave the discharge subject to section 1311's total bar). Indeed, the Clean Water Act is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," not to create a means for polluters to

discharge pollution. *See* 33 U.S.C. § 1251(a). There [13] is no right to discharge waste. Cal.Wat. Code, § 13263 ("All discharges of waste into waters of the state are privileges, not rights.").

When a permittee applies for, and receives, an NPDES permit, it implicitly agrees to comply with a host of regulations and requirements. Among these is the need to establish and maintain records, sample and monitor discharges and report the results to the permitting agency. *See* 33 U.S.C. § 1318(a); 40 C.F.R. §§ 122.41(j); 122.48 & 123.25. This system of self-reporting is critical to the NPDES program, which "fundamentally relies" upon it. *U.S. v. Brittain,* 931 F.2d 1413, 1416 (10th Cir. 1991).[5] The data provided through accurate and complete monitoring reports serve as conclusive evidence as to whether permit violations exist. *Ibid.*; *see also* 40 C.F.R. §§ 122.26(d)(1)(iv)(B) (permit application must describe program to sample and analyze discharges);

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[5] The need for this self-monitoring and assessment explains why a municipality cannot obtain a permit at all without proposing a monitoring program for representative data collection. *See, e.g.,* 42 C.F.R. § 122.26(d)(2)(iii)(D). Recognizing that administrative agencies rely upon monitoring and other reports to set permit conditions and enforce their terms, federal regulations require that these documents be signed and certified. 40 C.F.R. §§ 122.22; 122.26(d)(2)(iii)(A)(4). A permittee faces civil and/or criminal penalties for submitting false or incomplete information. 40 C.F.R. §§ 122.22(d); 122.41(*l*)(8). A permitting agency may even terminate a permit or refuse to issue a new one if a permittees [sic] misrepresents facts at any time. 40 C.F.R. § 122.64(a).

(d)(1)(iv)(E) (sampling points must be "appropriate for representative data collection"); 122.41(j) (samples should represent monitored activity); 122.44(i)(1) (permits must use monitoring to assure permit compliance). The reports do not exist in a vacuum; it is the very process of reliable information-gathering and analysis required by these reports through which NPDES permits meet their goals of reducing or eliminating the discharge of pollutants.

Given the importance of self-monitoring, analysis and reporting to NPDES permits – and, specifically to this Permit's requirements – the City cannot wait until the Regional Board formally declares the City's discharges to cause or contribute to exceedances before the City bears the responsibility to engage in self-analysis and [14] reporting. The City cannot shift the initial determination of liability from a straight look at objective monitoring data (asking whether levels of a given pollutant are greater than the applicable water quality standard) to instead require a subjective investigation as to the liability of each and every discharger potentially responsible for an exceedance of water quality standards before presuming that some, or all, of them bear responsibility. Under the latter regime, the regulatory agency would need to formally establish that the particular municipality caused or contributed to an exceedance in order to obtain the very information needed to make that determination in the first place. The argument is circular.

To accept the City's argument, along with its arguments elsewhere, would create a nonsensical permit implementation scheme that completely violates public policy and contradicts the purpose of the Clean Water Act. The scheme would be this: the permittees would perform sampling and monitoring; they may become aware of violations of water quality standards; their own MS4s could be responsible for the violations; they could choose to ignore the violations or, choose not to report on such violations until the Regional Board ordered an investigation; if the Regional Board did not do so, then the permittee could do nothing; but if the Regional Board or a citizen's group attempted enforcement without the information the permittee should have provided in the report, the permittee could shield itself from liability by claiming that the enforcing party did not have sufficient information to enforce the Permit.

Such a scheme would be inconsistent with the Clean Water Act's requirement for monitoring that is sufficient to determine compliance with water quality standards and its assumption that permittees will not hide from or turn a "blind-eye" (whether willful or not) to violations. Indeed, under the City's read of the Permit and supporting law, no permittee would ever want to know of potential Permit violations or water quality exceedances. And, if they knew of violations or [15] exceedances, they would not attempt to investigate whether the source of the discharges was theirs.

In contrast to the City's suggested implementation scheme, the effectiveness of the permittees' storm

water and other programs depends upon their honest participation; otherwise, the NPDES program does not function to reduce and eliminate the discharge of pollutants. Compliance should not turn on whether a permittee gets caught violating the Permit. It is the permittee, not the Regional Board, which bears the burden of catching problems with its system and, more importantly, reporting and addressing them. RB RJN, Exhibit A, at 73, ¶ 6.A.2; *see also* 40 C.F.R. §122.41(*l*)(8).

For example, every year, permittees must provide the Principal Permittee with "Individual Annual Reports," which must summarize their storm water management programs' effectiveness.[6] RB RJN, Exhibit B, Monitoring and Reporting Program, at 81, § I.A.3; Exhibit C, Individual Annual Report Form, at 139. The summary should include an assessment of compliance with permit requirements, the strength and weaknesses of the management program and how cities have coordinated in support of those

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[6] The permittees' Individual Annual Report Form asks whether a permittee is aware, or has been informed, that its MS4 has caused or contributed to a violation of water quality standards or condition of nuisance. RB RJN, Exhibit C, Permit at 106. It also asks the permittee if the Regional Board has advised it that its MS4 has caused or contributed to an exceedance of water quality standards. *Ibid.* Under *either* situation, the permittee must attach a Receiving Water Limitations Compliance Report to its annual report. *Ibid.* This requirement stands in contrast to the City's read of Part 2.3 as allowing it to wait for the Regional Board to issue orders before reporting on exceedances of water quality standards.

programs. *Ibid.* Without effective monitoring and self-assessment, permittees cannot perform this analysis and reporting. Any failure to provide such complete reports creates a further problem: the Principal Permittee is required to submit a monitoring report every year based upon the Individual Annual Reports. RB RJN, Exhibit B, at 82. The report must provide data and results of water quality monitoring. *Ibid.* It must analyze, [16] identify, and prioritize water quality problems. *Ibid.* It must identify potential sources of the problems and recommend future monitoring and programs to identify and address sources of pollutant discharges. *Id.* at 82-83. Thus, the determination of whether the Permit adequately controls the discharge of pollutants, why it does not adequately control the discharge of pollutants and how to prevent such discharges, rests upon the permittees to faithfully implement the Permit's terms.

The permittees are best situated to perform this analysis. It only makes sense, therefore, that they cannot shield themselves from self-analysis and reporting obligations by shifting the burden to enforcing parties to prove that the City is liable for the discharge before these obligations arise.[7] All

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[7] As another example, for the Bacteria TMDL provisions incorporated into Part 2.5 and 2.6, the Regional Board advises that if Receiving Waters Limitations are exceeded, it "will generally" issue an order requesting investigation. RB RJN 19, ¶ 37. But "generally" suggests that this may not always occur and, when read with the Permit's other requirements, means that permittees cannot wait for Regional Board notification

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permittees are expected to report any discharges that cause or contribute to exceedances of water quality standards or other instances of non-compliance. RB RJN, Exhibit A, at 73 ¶ 6.A.3.

C. The Systemwide Basis for the Permit Creates The Presumption that Municipalities Upstream of an Exceedance Share Liability for Exceedances.

The Clean Water Act allows the Regional Board to issue MS4 permits on a system-wide basis, as it did for the City and its co-permittees. See 40 C.F.R. § 122.26(a)(1)(v) & (a)(3)(ii) (permitting agency may issue permit for categories of discharge, such as by municipality, by watershed, by system, or by jurisdictions). This was the type of permit the City and 82 co-permittees sought, including the County of Los Angeles and the lead permittee, the Los Angeles County Flood Control District. RB RJN, Exhibit D, at 149-155. This was the type of permit they received.

[17] The City's argument – that it can act as if it is the only permittee – misunderstands the operation of MS4 permits. The word "municipal" in MS4 refers to the type of discharger and does not imply that the permit has issued to a single municipality. Final Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm

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before beginning the self-evaluation and analysis necessary to correct exceedances.

Water Discharges, 55 Fed.Reg. 47,990, 48,040-41 (Nov. 15, 1990). The City could have applied for its own permit. 40 C.F.R. § 122.26(f). It chose not to do so. Thus, it became part of a larger system that must recognize the physical reality of the sewer systems' interconnectedness.

For this Permit – and for MS4 permits in general – co-permittees have an enforceable obligation to cooperate with day-to-day obligations and in response to observed exceedances. RB RJN, Exhibit A, at 27-29. As a general matter, each MS4 owner or operator is responsible for pollutants discharged from its system. *Id.* at 5, 20-21. In addition, by accepting a permit based on system-wide discharges, the City agreed to accept the additional roles and responsibilities necessary to control, and reduce the discharge of pollutants in, comingled discharges. *See, e.g.* 40 C.F.R. § 122.26(d)(2)(iv) (permit applicants propose management programs and controls showing plan for inter-government coordination to reduce the discharge of pollutants through management practices and controls), (d)(2)(vii) (when more than one legal entity applies for a permit, they agree to accept the roles and responsibilities necessary to ensure effective coordination) & (d)(2)(i)(D) (permittee must have legal authority and agreement with other dischargers to control contribution of pollutants from one portion of the MS4 to another). This responsibility is the only meaningful way to read the requirements for a system-wide permit. If a permittee desires to opt out of this system-wide responsibility, it may submit its own

distinct permit application which only covers discharges from its own MS4. 40 C.F.R. § 122.26(a)(3)(iii)(B). Until then, it is part of a larger system.

[18] The Permit recognizes that the interconnected nature of the system means that it may be difficult to determine exactly where pollutanted [sic] originated within the MS4. This does not mean, however, that the Permit assumes only one permittee may be responsible. Instead, it recognizes that in such an integrated storm sewer system, "one or more Permittees" may have caused or contributed to violations. RB RJN, Exhibit A, at 19, ¶ 37(d).

With respect to Parts 2.5 and 2.6 of the Permit (the Dry-Weather Bacteria TMDL provisions), the Permit provides a means for the Regional Board to "rule out" potential contributors pollutants to the system. Once the permittee or Regional Board has data that show such exceedances, the permittee must provide information on its system. Based upon this information, the Regional Board may determine that no enforcement is warranted against the permittee. For example, if the Regional Board determines that the permittee could not have caused or contributed to the exceedance, the permittee will not be held liable for the water quality violation. RB RJN, Exhibit A, at 19, ¶ 37. Once data indicate that a violation of water quality standards is occurring, the Permit requires the permittees to undertake the necessary inquiry and develop information to either demonstrate that its discharges are not the source of the exceedances

or, if they are the source, they must correct the problem. At this time, the City has not conducted the required inquiry and provided the Regional Board with the necessary information. The Regional Board has not determined that the City is not liable.

Having constructed a joint storm sewer system that, by design, co-mingles the cities' discharges, they cannot avoid enforcement because one cannot determine the original source of pollutants in the waste stream. Moreover, the Permit incorporates the type of monitoring scheme that the permittees' expressly requested in their permit application. RB RJN, Exhibit D, at 195-204. That scheme determines compliance not at any city's individual outfalls, but in-stream at "mass emissions stations" or at beach compliance monitoring sites, where waste has [19] already co-mingled. In other words, the monitoring program that the permittees requested (and were granted) does not readily generate the permittee-by-permittee outfall data that the City would require as a precondition to enforcement. Therefore, any attempt to enforce the receiving water limitations would require an extensive and expensive investigation. It would require the Regional Board to know all potential legal and illicit sources of discharge within a permittees' system and jurisdiction. It further would require the Regional Board to distinguish between molecules of pollutants as to whether they came from one city's MS4 or another's. The Regional Board does not agree with the City that this burden

rests upon the enforcing entity before violations are proven.

The City's proposed burden-shifting undermines the enforceability of a system-wide-based Permit. On the contrary, the Clean Water Act seeks to encourage, not impede, enforcement efforts and does not impose a heavy burden upon those who seek to hold violators accountable:

> One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations at the time of enforcement. Enforcement of violations of requirements of this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

U.S. v. Brittain, supra, 931 F.2d at 1416-1417 (citing legislative history for Clean Water Act). In the context of citizens' suits, allowing a permittee that knows of water quality violations to wait for the government to fully investigate discharges, and use any failure to perform such an investigation to shield itself from liability, would contradict the need to ensure that environmental laws are enforced. *See, e.g., Sierra Club v. Union Oil Co. of Cal.,* (N.D. Cal. 1988) 716 F.Supp. 429, 436 (allowing citizens' suits to enforce environmental laws absent state enforcement, rather than finding that government has "acquiesced" to permit violations by not investigating).

[20] The Clean Water Act puts the onus on the permittee to have sufficient control over its system to

prevent discharges that are not compliant. See, *e.g*, 40 C.F.R. § 122.26(d)(2)(iv)(B)(3) (application for permit must show how permittees will investigate any part of their system with a reasonable potential for contributing pollutants into the system from other sources). The Permit is in accord. RB RJN, Exhibit A, at 30-31 (permittees must have legal authority to inspect and monitor industrial sources within their jurisdiction that have the potential to discharge polluted storm water to the MS4). The Act requires permittees to know their systems and to constantly evaluate the sufficiency of their storm water programs.

Finally, should any permittee determine that it no longer wishes to be permitted under a system-wide regime, it has multiple opportunities to seek to have the permit modified or opt out of the permit. Permits issued on a jurisdiction-wide, system-wide watershed or other basis may specify different conditions relating to different discharges. 40 C.F.R. § 122.26(a)(3)(v). So, if a permittee is unable or unwilling to cooperate with adjacent jurisdictions within the structures created by the Permit, it could ask for particular situations/discharges to have their own conditions imposed. It may also seek its own permit with permit terms that are specific to its own MS4. 40 C.F.R. § 122.26(a)(3)(iii)(B). Or, conceivably, the MS4 operator who neither desires to work with other operators on a system-wide basis, nor wants responsibility for its own permit, could be denied a permit entirely. *See Natural Res. Def. Council v. Costle,* 568 F.2d at 1375.

"The use of the word 'may' in [33 U.S.C. § 1342] means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of [§ 1311]. This is the natural reading, and the one that retains the fundamental logic of the statute." (*Ibid.* (emphasis added).)

[21] **IV. A VIOLATION OF THE OCEAN PLAN DISCHARGE PROHIBITION IS A VIOLATION OF THE PERMIT.**

The City argues that the Ocean Plan's prohibition of discharging waste into an Areas of Special Biological Significance (ASBS) is not incorporated into the Permit. The Regional Board does not agree.

As noted above, the Permit incorporates Water Quality Standards from two Water Quality Control Plans: the Basin Plan for the Los Angeles Region and the statewide Ocean Plan. RB RJN, Exhibit A, Part 5 at 72 ("'Water Quality Standards and Water Quality Objectives' means water quality criteria contained in the Basin Plan [and] the California Ocean Plan. . . ."); Cal.Wat. Code § 13050. The Permit does not make any distinction between the force and effect of the two plans. Indeed the findings note that the "Ocean Plan contains water quality objectives *which apply to all discharges to the coastal waters of California.*"[8] RB RJN, Exhibit A, at 13 (emphasis added).

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[8] A similar provision was included in the Permitees' permit application. RB RJN, Exhibit D, at152.

The Ocean Plan is required by Water Code section 13170.2, which directs the State Board to update the plan triennially. The prohibition on discharges of waste into ASBS is one such Water Quality Standard. RB RJN, Exhibit I, Ocean Plan, at 307-308 & 310; *In re Cal. Dep't of Transp.*, Order WQ 2001-08 at 8-9 (Apr. 26, 2001) (*CalTrans*) ("The Ocean Plan discharge prohibition is a water quality standard.")

The discharge prohibition is self-implementing and incorporated into the Permit. Nothing in the language of the prohibition itself – "Waste shall not be discharged to designated Areas of Special Biological Significance except as provided in [the implementation provisions]." – or in those implementation provisions – "Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas" [22] suggests that any additional agency action is needed to effectuate the prohibition. RB RJN, Exhibit I, Ocean Plan, at 307-308 & 310. On the contrary, the Ocean Plan establishes procedures for the State Board and the regional boards, respectively, to give permanent and temporary exceptions to the discharge prohibition. RB RJN, Exhibit I, Ocean Plan, at 307-308 & 310. Neither provision would be necessary if the prohibition was subject to an implementation process of the sort the City suggests.

The Permit requires compliance with the ASBS discharge prohibition. Here again, this is not a question of the Regional Board's discretion. Rather, the State Board's determination in *CalTrans* that the

discharge prohibition is a water quality standard is binding on the Regional Board. Accordingly, the Permit itself references the *CalTrans* decision "The State Board in In Re: California Department of Transportation (State Board Order WQ 2001-08), determined that the discharge of storm water to ASBS is subject to the prohibition in the Ocean Plan against the discharge of wastes to an ASBS."[9] RB RJN, Exhibit A, at 13.

In *CalTrans,* the California Department of Transportation (CalTrans) challenged a Cease and Desist Order, in which the Santa Ana Regional Board had directed the agency to cease discharging storm-water into an ASBS. The State Board held first that that "the discharge prohibition in the current Ocean Plan applies to storm water runoff." RB RJN, Exhibit H, State Water Resources Control Board, Order WQ 2001-09 at 271-272. The State Board then addressed *CalTrans'* contention that its State-Board-issued municipal storm water permit shielded it [23] from

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[9] This provision appeared in the Permit as issued in 2001. See http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ms4_permits/los_angeles/01-182_LosAngleles [sic] MS4Permit.pdf.

The State Board issued its *CalTrans* order in April 2001; the Regional Board issued the 2001 Permit in December 2001. That a former employee of the Regional Board, Dr Xavier Swamikannu, in his deposition, did not recall that the CalTrans decision predated the Permit is of no consequence.

compliance with the discharge prohibition.[10] The State Board held there was no inconsistency because the CalTrans' permit incorporated the Discharge Prohibition. RB RJN, Exhibit H, at 272-273 ("Receiving Water Limitation C-1-2 [sic.] prohibits discharges in violation of water quality standards. The Ocean Plan discharge prohibition is a water quality standard.)"[11]

It is precisely because most Clean Water Act enforcement proceedings are based on violations of NPDES permits, as Malibu (and CalTrans) acknowledge, that water quality standards are incorporated wholesale rather than individually. *EPA v. State Bd., supra,* 426 U.S. 200 at 205 ("With few exceptions, for enforcement purposes a discharger in compliance with the terms and conditions of an NPDES permit is deemed to be in compliance with those sections of the Amendments on which the permit conditions are based. . . .") In the case of the Permit, as upheld by the California Court of Appeal, it incorporated and transformed the water quality standards into an enforceable prohibition on causing or contributing to exceedances of water quality

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[10] Although not a municipality under state law, because it owns and manages a municipal separate storm sewer system as defined by the Clean Water Act, CalTrans is required to obtain a "municipal" storm water permit. 40 C.F.R. § 122.26(b)(8).

[11] The Receiving Water Limitations in the present Permit and in the CalTrans permit are virtually identical. The applicable provision of the CalTrans permit is C-1-1; the reference in the CalTrans decision to Receiving Water Limitation C-1-2 appears to be a typographical error.

standards. The City's interpretation of the Permit's Receiving Water Limitations, such as section 2.1 of the Permit, would undermine, rather than "transform," water quality standards if dischargers were shielded from every such standard not explicitly incorporated into the permit.

[24] CONCLUSION

As stated above, the California Regional Water Quality Control Board, Los Angeles Region, disagrees with the arguments asserted by the City of Malibu with respect to the Regional Board's Permit. The Regional Board therefore respectfully asks this Court to consider the Regional Board's positions, as stated within this amicus curiae brief, and would be pleased to provide any other assistance to the Court.

Dated:
January 29, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
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/s/ Jennifer Novak

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC., and SANTA MONICA BAYKEEPER, Plaintiffs, v. COUNTY OF LOS ANGELES, et al., Defendants.	No. CV 08-01467 AHM (PLAx) **Declaration of Ubaldo Fernandez in Support of Plaintiffs' Supplemental Brief on Summary Judgment** (Filed Mar. 10, 2010)

I, Ubaldo Fernandez, declare as follows:

1. My name is Ubaldo Fernandez and I am employed as a litigation assistant by the Natural Resources Defense Council, Inc. ("NRDC"), one of the plaintiffs in this case. My office address is 111 Sutter Street, San Francisco, California, 94104.

2. Attached as Exhibit A is a true and correct copy of excerpts from Appendix B to the 2002-03 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

3. Attached as Exhibit B is a true and correct copy of excerpts from Appendix B to the 2003-04 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

4. Attached as Exhibit C is a true and correct copy of excerpts from Appendix C to the Los Angeles County 1994-2005 Integrated Receiving Water Impacts Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

5. Attached as Exhibit D is a true and correct copy of excerpts from Appendix B to the 2005-06 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County

Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

6. Attached as Exhibit E is a true and correct copy of excerpts from Appendix B to the 2006-07 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

7. Attached as Exhibit F is a true and correct copy of excerpts from Appendix B to the 2007-08 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

8. Attached as Exhibit G is a true and correct copy of excerpts from Appendix B to the 2008-09 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

9. I have reviewed those portions of the reports excerpted in Exhibits A through G that list sampling results from the mass emission monitoring stations in Malibu Creek and the Santa Clara River for the reporting years 2002-03 through 2008-09. For each reporting year, I compiled a summary table of water quality standards exceedances based on each year's sampling results. These summary tables are attached as Exhibit H. The summary tables list the watershed, the date of the exceedance, the pollutant of concern,

and the standard exceeded (including the applicable numeric threshold where available). In noting exceedances, I assumed (1) that all sampling events identified as exceedances in the reports (with highlighting) were exceedances, and (2) that the reports reflected application of the California Toxics Rule for metals, as they are required to do.

10. Attached as Exhibit I is a true and correct copy of excerpts from the transcript of the June 2, 2009 Deposition of Mark Pestrella.

11. Attached as Exhibit J transcript is a true and correct copy of excerpts from the transcript of the December 14, 2009 Deposition of Robert Collacott.

12. Attached as Exhibit K is a true and correct copy of excerpts from a November 2005 report entitled "Wet and Dry Weather Comprehensive Report for Malibu Creek Watershed Water Quality Monitoring Project," prepared by Weston Solutions, Inc. for the Los Angeles County Department of Public Works. A copy of this report was provided to plaintiffs by defendants in discovery. The report lists water sampling results for seven drains in the Malibu Creek Watershed. It identifies all seven drains as owned by the Los Angeles County Department of Public Works.

13. Using Google Maps, I compared the locations of the seven drains listed in Exhibit K to the location of the Malibu Creek mass emission station, using the map included in the 2008-09 Los Angeles County Stormwater Monitoring Report (available at http://dpw.lacounty.gov/wmd/NPDES/2008-09_Report/Figures/

Figure2-3_MalibuCreek_S02.pdf). All seven drains are upstream of the Malibu Creek mass emission station.

14. Attached as Exhibit L are excerpts from an August 2006 report entitled "Upper Las Virgenes Creek Water Quality Improvement Project Report" and prepared by the Los Angeles County Department of Public Works Watershed Management Division. A copy of this report was provided to plaintiffs by defendants in discovery. The report lists water sampling results for six drains in the Malibu Creek Watershed. It identifies all six drains as owned by Los Angeles County or Los Angeles County's Department of Public Works.

15. Using Google Maps, I compared the locations of the six drains listed in Exhibit L to the location of the Malibu Creek mass emission station, using the map included in the 2008-09 Los Angeles County Stormwater Monitoring Report (available at http://dpw.lacounty.gov/wmd/NPDES/2008-09_Report/Figures/Figure2-3_MalibuCreek_S02.pdf). All six drains are upstream of the Malibu Creek mass emission station.

16. Attached as Exhibit M is a true and correct copy of excerpts from a July 1, 2003 report entitled "Dry Weather Discharge Treatment Feasibility Study," submitted by the County of Los Angeles Department of Public Works Watershed Management Division on behalf of the County of Los Angeles Municipal Storm Water Permittees. The report identifies a number of

drains in the Los Angeles River Watershed as owned by Los Angeles County.

17. Using Google Maps, I compared the drains listed in Exhibit M as County-owned drains within the Los Angeles Watershed to the location of the Los Angeles River mass emission station, using the map included in the 2008-09 Los Angeles County Stormwater Monitoring Report (available at http://dpw.lacounty.gov/wmd/NPDES/2008-09_Report/Figures/Figure2-3_MalibuCreek_S02.pdf). Among other County-owned drains, the drains identified as LAR-6 (Aliso Creek), LAR-16 (Project 14), LAR-1 (Project 5202), LAR-14 (Arroyo Seco), and LAR-19 (Compton Creek) are upstream of the Los Angeles River mass emission station.

18. Attached as Exhibit N is a true and correct copy of excerpts from Table 4-5 to the 2003-04 Los Angeles County Stormwater Monitoring Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

19. Attached as Exhibit O is a true and correct copy of excerpts from Chapter 5 to the Los Angeles County 1994-2005 Integrated Receiving Water Impacts Report. I downloaded this report from the Los Angeles County Department of Public Works website at http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm.

20. Attached as Exhibit P are true and correct copies of sampling documents provided to plaintiffs by defendants in discovery.

Pursuant to 28 U.S.C. § 1746, I declare and affirm under penalty of perjury that the foregoing is true and correct.

/s/ Ubaldo Fernandez
Ubaldo Fernandez

Executed in San Francisco, California on March 10, 2010.

EXHIBIT I

Excerpts from Transcript of Deposition of Mark Pestrella (June 2, 2009)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER, Plaintiffs, vs. COUNTY OF LOS ANGELES, et al., Defendants.	No. CV 08-01467 AHM (PLAx)

VOLUME II

Deposition of MARK PESTRELLA, taken on behalf of the Plaintiffs, at 1314 2nd Street, Santa Monica, California, commencing at 9:01 a.m., on June 2, 2009, before Evelyn Mah, CSR No. 4231, RPR.

(Filed Mar. 10, 2010)

* * *

[259] **Surfrider Beach?**

MR. GEST: Objection. Vague and ambiguous, lacks foundation.

Q BY MR. COLANGELO: Let me strike that. Does – let's strike that, too.

Does the County have ways to control what enters into the County's MS4 system?

A Seems like a vague question.

Q Okay. Let me break it down. Does the County have any authority over what goes into its MS4 system?

MR. GEST: Objection. Calls for a legal conclusion.

You can answer if you know.

THE DEPONENT: Yeah. I think we have provisions for what could be drained to that system.

Q BY MR. COLANGELO: What are you referring to?

A Permits required for connection to that system.

Q Okay. Anything else?

A We regularly use enforcement action when – so we have code that allows us to – county code that allows us to restrict what is drained into those systems.

Q When you say, "county code," is that the same as an ordinance?

A Yes.

Q Anything else?

[260] A That's what I can think of.

Q What about physical infrastructure? I am speaking just about the County. I will go back and ask these questions for the District.

A Okay.

Q For physical infrastructure, does the County have any mechanisms it can use to control what enters into the County's MS4?

A Physically control?

Q Yes.

A Certainly you can control what enters into an inlet.

Q How so?

A Block the inlet.

Q Block it entirely?

A Block it entirely. Not something you want to do, but physically you can stop water from entering into a system, yes.

Q What about screens? Can you screen an inlet to prevent introduction of certain things?

A Yes.

Q Are there any other physical devices that the County uses to prevent anything from entering into its MS4 system?

A BMPs, best management practices.

[261] **Q Okay. Like what?**

A Screens, as you mentioned.

Q Right.

A What we actually call automatic retractable screens, ARS.

Q Did you say, "automatic retractable"?

A Automatic retracting screens on the face of the catch basin, which is one BMP we are using. LID, low impact development, provisions that are placed, bioswells. Infiltration is used commonly by the County. Any number of BMPs that are appropriate for the infrastructure that we are talking about.

Q What is a bioswell?

A Bioswell is a system for treatment of stormwater that involves – typically involves biological treatment of the water by capturing and either infiltrating or treating the water before it's released from a device. And the device is typically a swell in the ground or an indentation in the ground that's planted with particular – specific materials and can also contain specific gradated material underground for infiltration.

Q When you say, "infiltration," you mean infiltration into groundwater?

A Not necessarily. Infiltration into the ground. [262] It may reach groundwater.

Q I see. Does it mean infiltration into the MS4 system or not?

A Not.

Q Okay. So – okay. I think I understand. And you refer to LIDS?

A Yes.

Q What's a LID?

A Low impact development standard.

Q What is that?

A It's a recognized method for – method for development of property or infrastructure that attempts to utilize – follow certain principles with

respect to hydrologic – restoration of hydrologic schemes, predevelopment hydrologic schemes.

Q I'm actually going to come back to that for the District later on instead of asking right now. Let me ask you something different. What is a flood control benefit assessment?

A What is the flood control benefit assessment.

Q What does the term refer to?

A It refers to an assessment that has been placed on properties for the benefit of flood control.

Q Does that generate income – sorry. Does that generate funding for the Flood Control District?

* * *

[359] Management Division. Looked like you had a sheet from there as well earlier. And our Data Management group has developed a database that is now accessible as well.

Q Are you talking about Exhibit 39?

A Yes.

Q Where within this website is that information contained?

A Data Management Section on the website under sections – let's see. Actually, I'm going to have to defer and find it, but I believe it's links that you

can go to, and then you look at Data Management Section.

Q Okay.

A And you can also speak with Oliver Galang who we spoke about earlier.

Q We have been talking about chloride. Is it the District's view that chloride measured at mass emissions stations reflects the conveyance of chloride in stormwater?

A Yes.

Q Does it reflect the conveyance of chloride in stormwater in the Flood Control District MS4?

A Yes.

Q Does it reflect the generation of chloride on County unincorporated lands?

A Not necessarily.

[360] **Q Do you have an opinion one way or the other?**

A No.

Q Do you know one way or the other?

A No.

Q Is antimony a constituent that's found in stormwater?

A Going to Exhibit 42, it appears it is, yes.

Q Why do you say it appears that it is?

A Because the data reflects that there was detection of antimony in stormwater, at least the one I'm looking at is Ballona Creek Mass Emissions Station.

Q Apart from looking at the mass emissions monitoring, would you look to any other information to answer that question whether antimony is a constituent found in stormwater?

A If I was asked to look for whether that's a constituent in stormwater?

Q Yes.

A I would look at literature.

Q Does the – do the District or the County have any understanding of whether antimony is a constituent found in stormwater?

A Other than mass emissions stations, not that I'm aware of.

Q Do you know what the sources are of antimony in [361] **stormwater?**

A No, I do not.

Q Do you know whether activities on County unincorporated land generate antimony that's conveyed in stormwater?

A No.

Q Is it the District's view that monitoring at the mass emissions stations reflects the conveyance of antimony in stormwater?

A Yes.

Q Is it the District's view that monitoring at mass emissions stations reflect the conveyance of antimony in the District's MS4 system?

A The District's portion of the MS4 system, yes.

Q Do you have any view of other sources of antimony that's measured at mass emissions stations?

A No.

Q No other – no understanding, you are saying, of any other sources?

A That's correct.

Q What about cyanide? Is cyanide a constituent that is contained in stormwater?

A Yes.

Q How would you characterize it? Is it commonly found in stormwater?

[362] A I would only characterize it based on what I have seen here in the mass emissions results, and these are four samples in an annual year, so I don't know if I can call it common.

Q Tell me what you are referring to.

A Exhibit 42.

Q Which page?

A And I'm – I'm aware – and I'm looking for Malibu Creek. I'm aware that we did detect cyanide in Malibu Creek. Hum.

MR. GEST: Malibu Creek?

THE DEPONENT: Oh, okay. Okay. Table 4-4.2, Malibu Creek. Cyanide, three samples, one detect. No exceedances.

Q BY MR. COLANGELO: I think, for that year – you can flip through each table if you want to. I think, for that year, there was one exceedance in all – at all the mass emissions stations for cyanide.

Independent of that table, do the District or the County have any understanding of whether cyanide is a constituent in stormwater?

A Cyanide has been found in stormwater, yes.

Q What are the sources of cyanide in stormwater?

A My understanding is limited, but I understand that it is – can be naturally occurring in geology of [363] the area, but that is what I know about cyanide.

Q Do you know about any other sources?

A No. I do not.

Q What about vehicle exhaust?

A Don't know about that.

Q What about pesticides?

A Don't know about that.

Q Do you know whether – or does the County know whether activities on County unincorporated land generate cyanide that's conveyed in stormwater?

A I don't know.

Q The County doesn't know?

A The County does not know.

Q In the District's view, do cyanide detections at the mass emissions stations reflect the conveyance of cyanide in stormwater?

A Yes.

Q Do they reflect the conveyance of cyanide from any other source, to the District's knowledge?

A It reflects a source of cyanide other than the MS4 system.

Q What do you mean by that?

A That the MS4 system does not generate cyanide.

Q Okay. I'm sorry. In the District's view, are there any other sources of cyanide that's detected at [364] the mass emissions station besides the conveyance of cyanide in stormwater?

A At the station itself? In other words, is there some cyanide present at the station or is it in the stormwater only?

Q No. I'm asking, when cyanide is detected at the mass emissions station, is it the District's view that there are any other possible sources for that cyanide besides the conveyance of cyanide in stormwater?

A We were sampling the stormwater. That's where we found it. So there wouldn't be any other source there.

Q Why do you say you're sampling the stormwater?

A We are pulling stormwater from the mass emissions station.

Q Are you referring to a particular mass emissions station?

A Each mass emissions station samples the water within the MS4.

Q So -

A It's conveying stormwater.

Q So the District's view is that each mass emissions station reflects what's in stormwater?

A Yes.

Q Conveyed by the District's MS4?

[365] A Yes.

Q For lead, is lead a constituent that is contained in stormwater?

A Yes.

Q Where does lead in stormwater come from?

A Lead is naturally occurring in nature, as well as used in manufacturing, all types of manufacturing. And so there are many potential sources of lead that could end up in stormwater.

Q Do activities on County unincorporated land generate lead that's conveyed in stormwater?

A I don't know.

Q Does the County know?

A No.

Q The lead that is detected at the mass emissions station, it's the District's view that that lead reflects the – sorry – that those detections reflect the conveyance of lead in stormwater from the District's MS4 system?

A Again, it reflects the stormwater being conveyed in the system is carrying lead, naturally occurring or otherwise.

Q So the answer is yes?

A Yes.

Q I've got seven more of these. Do you want to [366] **take a break?**

A Let's go.

Q Okay. Silver.

A Unless someone else wants to.

Q I'm fine. Do you want a break?

Is silver a constituent that is contained in stormwater?

A Silver has been found to be contained in stormwater, yes.

Q Where does silver that is contained in stormwater come from?

A I don't know.

Q Does the District or the County have any understanding of where silver in stormwater comes from?

A Other than naturally occurring, neither the County nor the District has ID'd sources of silver.

Q Do activities on County unincorporated land generate silver that is conveyed in stormwater?

A I don't know.

Q Does the District believe that sampling that shows detections of silver at mass emissions stations reflects conveyance of silver from the District's MS4?

A Conveyance – I'm having trouble with the term, "from." Within system, we have found silver to be contained in stormwater.

[367] **Q Okay. How have you found it?**

A Through sampling on the mass emissions stations.

Q Okay. And that reflects, in the District's view, the conveyance of silver within the District's MS4?

A Yes.

Q Is sulfate a constituent that is contained in stormwater?

A Do I need to look every one of these up?

Q If you know without resorting to the table, you can answer the question.

A I need to refer on that one.

Q Take a look at Table 4-4.2. The first page of the table for Malibu Creek mass emissions station, under the third class, the third class is "General," and then the fourth constituent is "Sulfate." Do you see that?

A Yes. I do.

Q It says four samples, four detects –

A Right.

Q – four exceedances. Do you see that?

A Yes, I do.

Q That's for wet weather?

A Yes.

Q Okay. So I think the question had been, is [368] **sulfate a constituent that is found in stormwater?**

A Yes. Sulfate has been found in stormwater.

Q Where does sulfate in stormwater come from?

A I can't say without speculating. I don't want to speculate.

Q That's fine.

Did the District or County have any view about where sulfate in stormwater comes from?

A No.

Q Do activities on County unincorporated land generate sulfate that's conveyed in stormwater?

A I don't know.

Q Do the detections of sulfate at the mass emissions stations reflect the District's conveyance of sulfate through the District's MS4?

A They – yes, they reflect stormwater containing sulfate as being conveyed through the District's portion of the MS4.

Q What about the County's? Does it reflect conveyance of stormwater containing sulfate in the County's portion of the MS4?

A I don't know.

Q Why is that?

A I'm not sampling on the County's. I am not being asked to sample under the permit nor am I sampling [369] for sulfate on the County's – currently, at least, on the County's MS4.

Q Okay. Do the detections of sulfate at the mass emissions stations reflect any sources of sulfate, to the District's knowledge, other than stormwater?

A Still, I didn't see the stormwater as the source of sulfate. It reflects sulfate within the stormwater at that point in the MS4 system where the mass emissions station is located.

Q Does it reflect sulfate coming from anything other than stormwater?

A It reflects sulfate is coming from somewhere, and it's being conveyed by the stormwater.

Q What does the term "total dissolved solids" refer to?

A TDS is a number of solids dissolved in stormwater or in water.

Q What does that mean? What does TDS – go ahead.

A It's a measure of the – of solids in water, and it can reflect the turbidity in the water as well. Turbidity is also measured. Things that break down in water can be dissolved by water. So you can have a breakdown of a constituent in the water. And that's my understanding of total dissolved solids.

[370] **Q Are total dissolved solids typically contained in stormwater?**

A Yes.

Q Do activities on County unincorporated land generate total dissolved solids that are conveyed or contained in stormwater?

A Any number of activities can occur to cause TDS to be detected in water, including stormwater.

Q What activities are those?

A Disturbance of soils, dust in the air, solids making their way to water. Almost any human activity can contribute to that – human or animal, otherwise, can contribute to that.

Q And did those activities occur on County unincorporated land?

A Yes.

Q Does the detection of total dissolved solids at the mass emissions station reflect a conveyance of TDS by the District's MS4 system?

A Yes.

Q Are there – what about the County's MS4 system?

A The mass emissions station, there is no way of reflecting on the County's system.

Q Okay. So that answer would be the same for all [371] **previous constituents we have been talking about and the next four or five I am going to ask you about?**

A Well, it's incredibly hard to link, even if possible, any of these to the County's MS4 system because, at one point in the mass emissions station on the MS4, downstream of all of these – potentially downstream of County – I'm not sure every one of these mass emissions station is downstream from the County land, although I would assume they are.

Q And why does that make it really hard to link the detection of the constituent to the County's MS4?

A Because of all of the reasons we spoke about earlier. This is not an indicator of or a way to allocate a responsibility to any one entity in the watershed, including discharges other than cities or MS- – or the rest of the MS4 system.

Q Do detections of total dissolved solids at mass emissions stations reflect the conveyance of TDS by any means other than stormwater?

A No.

Q What is dissolved oxygen a measure of?

A Amount of dissolved oxygen in the water. The way that plant life breaks down creates a certain amount of dissolved oxygen in the water, and it's a measure of the – that's just what it is, a measure of dissolved [372] oxygen in water.

Q Why is that – if the District or County has any view, why is that a constituent of concern?

A Because it could be toxic.

Q What's the relation between stormwater contributions and dissolved oxygen, if any?

A Well, it – typically, if you have biodegradation happening in the water in some portion of the system, even naturally – well, typically, naturally occurring

areas, dissolved oxygen is going to be impacted by that breakdown in plant life. And so when you measure dissolved oxygen, you might find that it's an indicator of something decaying in a certain manner, typically, like a growth being buried or covered, not having daylight.

Q You said, "growth being buried"?

A Yeah. Or you could have a storm event in an area, sediment cover an area, and then you could have nutrients in there that are breaking down without oxygen and causes a – in effect, a dissolved oxygen in the water.

Q Are you referring to – when you say, "breaking down," are you referring to decaying organic matter?

A Decaying, yes.

Q What is the – strike that.

[373] **Why, from the District's view, is dissolved oxygen a constituent of concern that is measured for compliance with the stormwater permit? Do you have any view about that?**

A Its toxicity – potential toxicity to wildlife.

Q What's the relationship between dissolved oxygen and stormwater?

A I don't know that there is a direct relationship. I mean, we find areas that are decaying in the rivering system that are naturally occurring, and you

have dissolved oxygen levels rise or drop, dependent upon the decay, and it can have an effect on wildlife.

Q Let me put it this way. If there were a problem with dissolved oxygen in a given river, is there anything that you could do, the County or the District, with respect to the conveyance of stormwater to deal with it?

MR. GEST: Objection. Vague and ambiguous.

THE DEPONENT: Well, you might clear the area. You might clear the water off the area or you might drain the area to get the bugs growing better in the area, but that's a – that's not typically a stormwater permit issue.

Q BY MR. COLANGELO: Dissolved oxygen isn't?

A Yeah. That's not typically something that – [374] you might see a bird die because of toxicity in an area along the rivering system, and, of course, it would be a concern to us for wildlife and to other regulatory agencies, but it's not typically something we're being – pointed out as an issue for stormwater permit.

Q What about boron? Is that a constituent that's contained in stormwater?

A I was going to go into my – I don't see it unless you know otherwise.

Q I'm asking for the District's understanding of whether boron was a constituent that was –

A The way I would know is whether or not it shows up in our mass emissions station, so if you see it.

Q If you don't see it in Exhibit 42, then, your answer would be no?

A My answer would be "No," based on my review of Exhibit 42.

Q What about nitrite? Is that a constituent that's contained in stormwater?

A Well, I know nitrate has been found in stormwater, so I can answer that one.

Q Did you say, "nitrate" or "nitrite"?

A I said. "nitrate." I'm sorry. Did you say "nitrite"?

Q Yes, with an "i," nitrite.

[375] A Again, unless it's listed here, I am not going to know about nitrite.

Q What is the relationship between nitrite and nitrate, if you know?

A That's a good chemistry question. I know it's a different chemical. You're taking me back to college chemistry.

Q Turn to just the – the first page of Table 4-4.2.

A Okay.

Q On the first page, under "Nutrients."

A Yeah.

Q The next-to-the-last nutrient, do you see nitrite?

A Yes, I do.

Q Now, on this table, I think it says four samples, no detects. Do you see that?

A Yes.

Q Okay. Check the first page of Table 4-4.3, in the same location on the table. I think it says five samples, three detects, no exceedances. Do you see that?

A Yes, I do.

Q So based on that, would you say that nitrite is a constituent that is conveyed in stormwater?

[376] A Yes. It's shown to be conveyed in stormwater.

Q Do you know where nitrite in stormwater comes from?

A Well, it's a nutrient base, so there are different nutrients that contribute to water – the makeup of water or what gets conveyed in water.

Q Do you know whether fertilizers are a source of nitrite in stormwater?

A I do not.

Q Do you know whether activities on County unincorporated land generate nitrite that's conveyed in stormwater?

A I do not know.

Q Is it the District's view that the detection of nitrite at mass emissions stations reflects the conveyance of nitrite in stormwater in the District's MS4 system?

A Yes.

Q Are you aware of any other sources of nitrite that would be reflected by the detection of nitrite at the mass emissions station –

A No.

Q – besides stormwater?

A I don't view stormwater as a source of nitrite other than it has been conveyed by stormwater, although, [377] as stated, I'm not – I'm not as familiar with nitrite as I am with nitrate.

Q Are you aware of any other – strike that.

Let me ask it this way. Does the detection of nitrite at the mass emissions stations reflect the conveyance of nitrite by any means other than stormwater?

A Mass emissions station, no.

Q And does it reflect the conveyance of nitrite by any means other than stormwater in the District's MS4 system?

A I'm sorry. Could you read that again.

(The record was read as follows:

"QUESTION: And does it reflect the conveyance of nitrite by any means other than stormwater in the District's MS4 system?")

THE DEPONENT: There's other portions of the MS4 system so they could he conveying it, and there could be other means for conveyance of nitrite. You could have wind-blown nutrients. You could have – so that could get into our system. It could actually be conveyed to our system that way.

Q BY MR. COLANGELO: I think my question might have been unclear or I'm not sure that the answer you gave is to the question I thought I asked.

[378] A Okay.

Q Let me rephrase it. The nitrite that is detected at the mass emissions stations, does

that reflect the conveyance of nitrite by any means other than stormwater in the District's MS4 station? And that would include, if you believe it does, the conveyance of nitrite by someone else's MS4 system or by wind blowing or any other source that you just mentioned.

A Well, it reflects the conveyance of nitrite in stormwater at this mass emissions station within our system. This mass emissions station is in the MS4 system in the Flood Control District. That portion of the MS4 system is in the Flood Control District.

Q Okay.

A So . . .

Q Okay. Your qualifier about other sources, what did you mean?

A Well, there are other potential ways that – within our system those – nitrogen and phosphorus can be conveyed, wind blown, dust blown. There are other ways it can be conveyed within our system besides water.

Q Within the District's MS4 system?

A Yes. Within the entire network of MS4 systems in the watershed.

Q And that answer is specific to nitrite?

* * *

EXHIBIT M

Dry Weather Discharge Treatment Feasibility Study County of Los Angeles Department of Public Works, Watershed Mgmt. Division (July 1, 2003)

(Filed Mar. 10, 2010)

Dry Weather Discharge Treatment Feasibility Study

Submitted by:
County of Los Angeles
Department of Public Works
Watershed Management Division

On behalf of:
County of Los Angeles
Municipal Storm Water Permittees
and
County Sanitation Districts of
Los Angeles County

July 1, 2003

1. Introduction

Urban runoff is a contributor of pollution to the nations' waterways. The National Pollution Discharge Elimination System (NPDES) permitting program provides a mechanism for the reduction of pollutants from Municipal Separate Storm Sewer Systems (MS4s) to the maximum extent practicable. One method identified for pollution reduction is the diversion of low-flow urban runoff to sanitary sewer treatment plants prior to reaching the waterways. Several factors such as availability of treatment capacity, available transport capacity, and the assurance that the

urban runoff pollutants will not upset the treatment process must all come together before low-flow diversion can be considered feasible.

In this study, the County of Los Angeles Permittees, in cooperation with the County Sanitation Districts of Los Angeles County (LACSD), identified dry weather storm drain discharges and evaluated the feasibility of 1) their diversion to an LACSD or City of Los Angeles sewer system or 2) their treatment using alternative treatment control Best Management Practices (BMPs).

1.1 MS4 Permit Background

This Treatment Feasibility Study was performed in order to fulfill the requirement of the County of Los Angeles Municipal Stormwater Permit (Permit) mandated in Part IV.F.10, Public Agency Activities Program, which states:

> "The Permittees in cooperation with the County Sanitation Districts of Los Angeles County shall conduct a study to investigate the possible diversion of dry weather discharges or the use of alternative Treatment Control BMPs to treat flows from their jurisdiction which may impact public health and safety and/or the environment. The Permittees shall collectively review their individual prioritized lists and create a watershed based priority list of drains for potential diversion or treatment and submit the priority listing

to the Regional Board Executive Officer, no later than July 1, 2003."

At the July, 2002, Executive Advisory Committee (EAC) meeting an ad hoc committee with members from LACSD, City of Los Angeles, County of Los Angeles Department of Public Works (County), and the various city representatives began working on this study on behalf of all Permittees. The committee has reported monthly to the EAC on the direction and progress of the study. In addition, Permittees have been updated on the study at the quarterly Watershed Management Committee meetings.

1.2 Expected Outcome

During the September, 2002, EAC meeting, Dennis Dickerson, Executive Officer of the Regional Water Quality Control Board, Los Angeles Region, indicated to the attendees that the priority lists from this study will be used to evaluate projects for future grant funding. Therefore, if a municipality applies for a grant to build a diversion or implement another treatment alternative for a drain on the priority list, they would be more likely to

* * *

Table 6

San Gabriel River Watershed Prioritized List[1]

	Map ID	Drain Ownership	Tributary Area[2]	Drain ID	Flow Rate[3]	Potential Candidate Diversion[4] to:	Alternative Treatment Candidate Only
					gpm		
1	SGR-12	County	County	Project 442	80	LACSD	
2	SGR-04	County	Pomona	MTD 184	20	LACSD	
3	SGR-05	County	Pomona	Project 266	35	LACSD	
4	SGR-10	County	County	MTD 76	100	LACSD	
5	SGR-18	County	West Covina	MTD 22	35	LACSD	
6	SGR-03	County	Cerritos – 40% Artesia – 60%	Projects 21 and 143	50		YES
7	SGR-08	County	Walnut – 90% County – 10%	Project 8301	40	LACSD	
8	SGR-20	County	Cerritos	Project 1113	30	LACSD	
9	SGR-07	County	County	MTD 1377	65	LACSD	
10	SGR-11	County	County	MTD 8	100	LACSD	
11	SGR-17	County	West Covina	Project 8402	35	LACSD	
12	SGR-16	County	West Covina	MTD 180	35	LACSD	
13	SGR-19	County	West Covina	Project 589	25	LACSD	
14	SGR-13	County	County	RDD 280	35	LACSD	
15	SGR-15	County	Covina – 75% West Covina – 25%	Charter Oak Wash	40	LACSD	
16	SGR-09	County	County	PD 1381	40	LACSD	
17	SGR-21	County	Downey	Project 9005	30		YES
18	SGR-14	County	County	MTD 587	35	LACSD	
19	SGR-06	County	Pomona	MTD 644	35	LACSD	
20	SGR-02	County	Cerritos – 25% Lakewood – 25% Hawaiin [sic] Gardens – 25% Long Beach – 25%	Project 21	40		YES

Notes:

1) Prioritized 1 through 20, with 1 being the highest priority. Prioritization based on pollutant loadings calculated from water quality results provided by SCCWRP.

2) Tributary Area is estimated based on storm drain alignment

3) Flow Rates were determined during field investigations.

4) See Appendix D for further details provided by LACSD

Table 7

Los Angeles River Watershed Prioritized List[1]

	Map ID	Drain Ownership	Tributary Area[2]	Drain ID	Flow Rate[3]	Potential Candidate Diversion[4] to:	Alternative Treatment Candidate Only
					gpm		
1	LAR-5	County	City of LA	Calabasas Creek	3596		YES
2	LAR-2	County	City of LA	Bell Creek	655		YES
3	LAR-15	County	City of LA	Project 67	563		YES
4	LAR-5	County	City of LA	Aliso Creek	1164		YES
5	LAR-16	County	City of LA	Project 14	2537		YES
6	LAR-21	County	Hidden Hills – 50% City of LA – 25% County – 25%	Project 4101	2098		YES
7	LAR-23	County	City of LA	City	150		YES
8	LAR-20	County	City of LA – 50% Calabasas – 50%	Dry Canyon Creek	1731		YES
9	LAR-3	County	City of LA	Dayton Creek	732		YES
10	LAR-18	County	Downey	Project 19	748	LACSD	
11	LAR-9	County	City of LA	Project 469	73		YES
12	LAR-1	County	City of LA	Project 5202	323		YES
13	LAR-13	County	City of LA	Project 60140	196		YES
14	LAR-14	County	City of LA	Arroyo Seco	2078		YES
15	LAR-32	City of Los Angeles	City of LA	City	22	City of LA	
16	LAR-17	County	County – 75% Vernon – 25%	Project 5550	288	LACSD	
17	LAR-22	County	Vernon – 80% County – 20%	DD1-28	168	LACSD	
18	LAR-27	City of Los Angeles	City of LA	City	258	City of LA	
19	LAR-29	County	Maywood – 50% Bell – 50%	Project 9903	321	LACSD	
20	LAR-11	County	City of LA	Project 464	79		YES
21	LAR-31	City of Los Angeles	City of LA	City	22	City of LA	
22	LAR-26	City of Los Angeles	City of LA	City	141	City of LA	

23	LAR-7	County	City of LA	Project 96	40		YES
24	LAR-8	County	City of LA	Project 474	55		YES
25	LAR-19	County	County – 33% Norwalk – 33% City of LA – 33%	Compton Creek	44	LACSD	
26	LAR-12	County	City of LA	Project 39	65		YES
27	LAR-30	County	Long Beach	Dominguez Gap	40	LACSD	
28	LAR-10	County	City of LA	Project 36	37		YES
29	LAR-4	County	City of LA	Browns Creek	47		YES
30	LAR-25	City of Los Angeles	City of LA	City	79	City of LA	
31	LAR-24	City of Los Angeles	City of LA	City	26	City of LA	
32	LAR-26	City of Los Angeles	City of LA	City	33	City of LA	

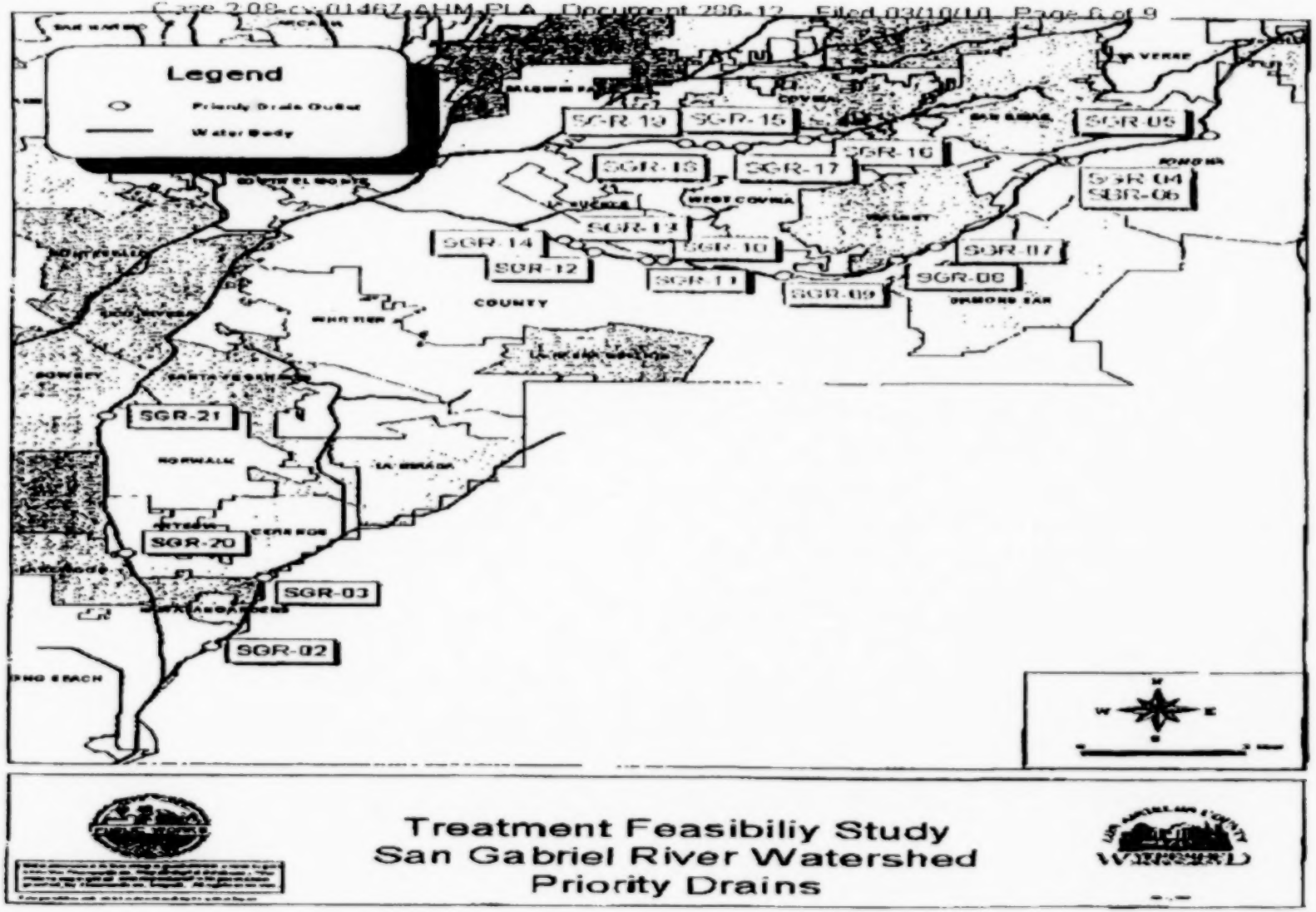
Notes:

1) Prioritized 1 through 32, with 1 being the highest priority. Prioritization based on pollutant loadings calculated from water quality results provided by SCCWRP.

2) Tributary Area is estimated based on storm drain alignment

3) Flow Rates were provided by SCCWRP.

4) See Appendix O for further details provided by LACSD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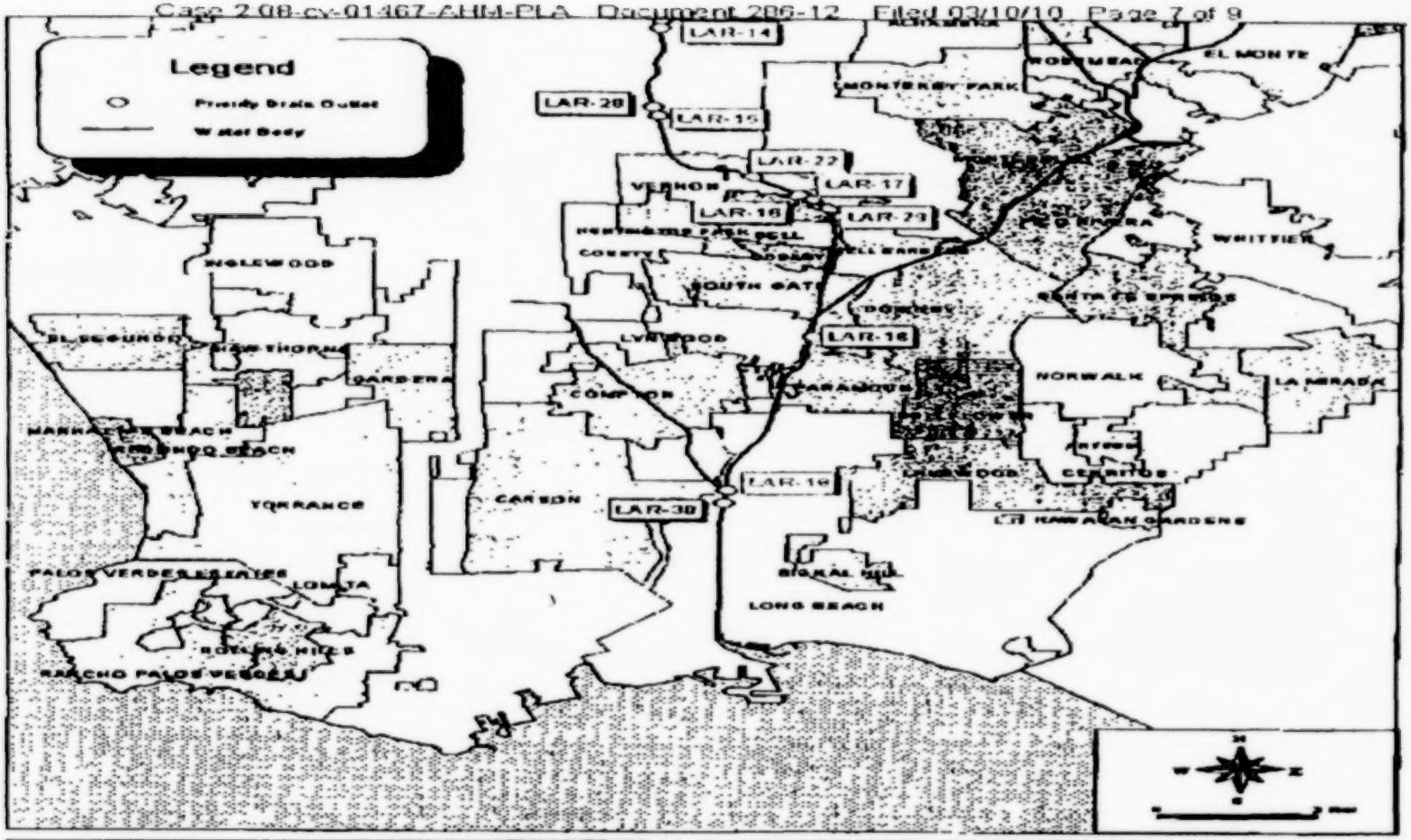
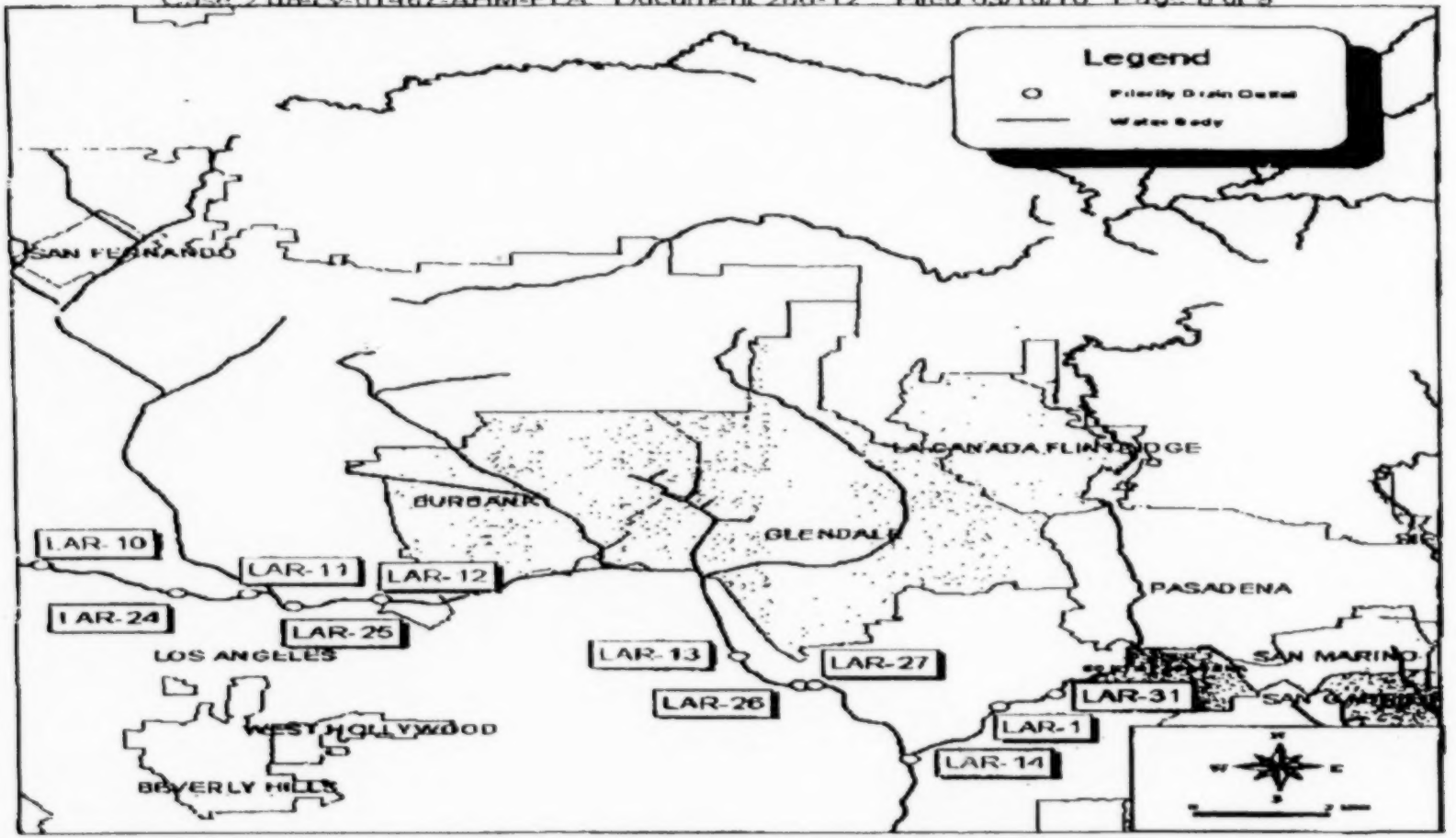
Treatment Feasibiliy Study
San Gabriel River Watershed
Priority Drains



Treatment Feasibiliy Study
Los Angeles River Watershed
Reach 1 of 3
Priority Drains



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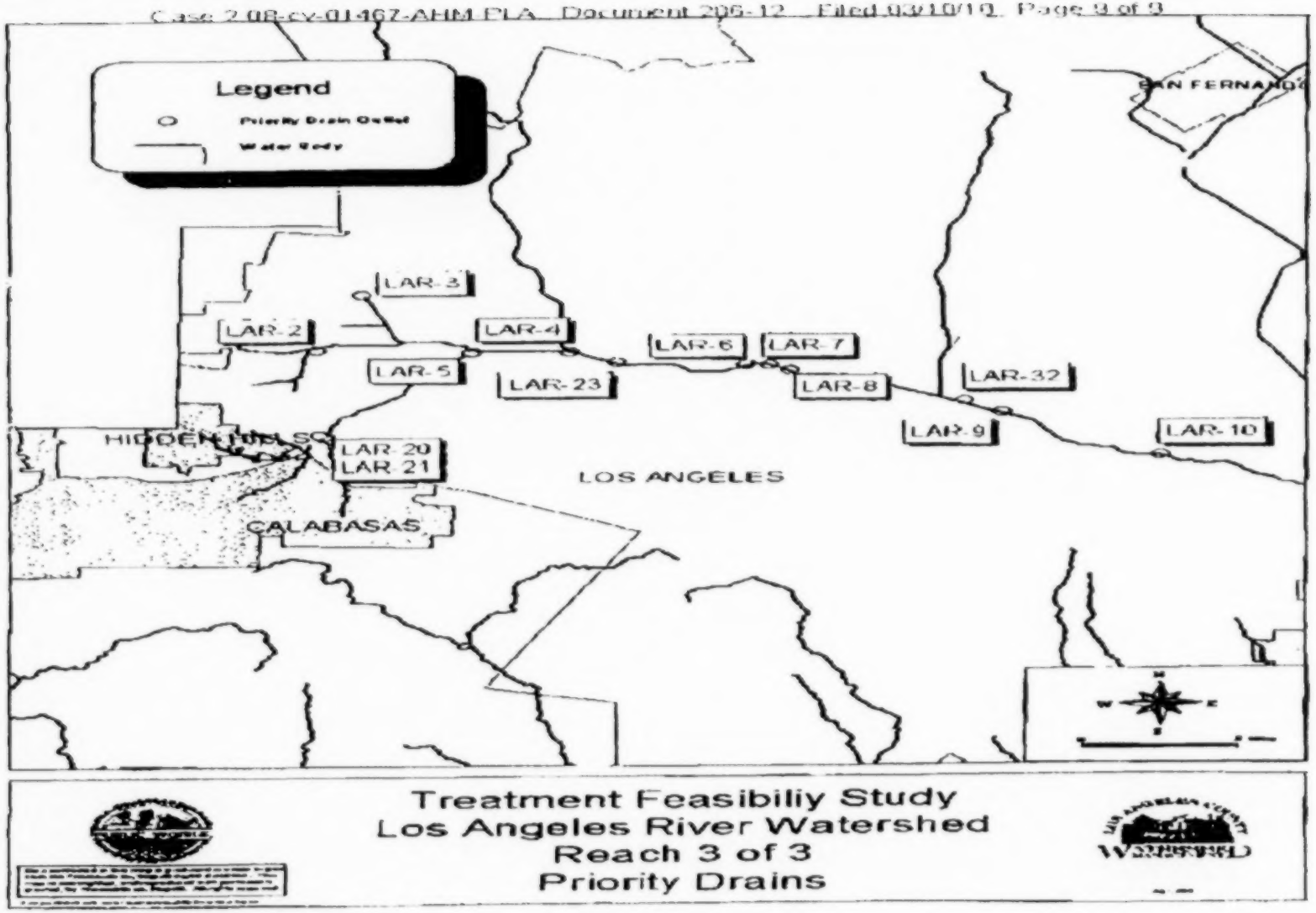

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PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 11-460

Supreme Court, U.S.
FILED
SEP 6 - 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants discharged from municipal storm sewer systems. 33 U.S.C. §1342(p).

The question presented is:

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Natural Resources Defense Council, Inc., and Santa Monica Baykeeper, plaintiffs, appellants below, and respondents here.
- Los Angeles County Flood Control District, defendant, appellee below, and petitioner here.

In addition, the County of Los Angeles was a defendant in the underlying action and an appellee in the proceedings below, but is not a party to the petition in this Court.

There are no publicly held corporations involved in this proceeding.

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OPINIONS BELOW

The July 13, 2011 order and opinion of the United States Court of Appeals for the Ninth Circuit that is the subject of this proceeding is reported at 673 F.3d 880 (9th Cir. 2011). (Appendix to Petition for Writ of Certiorari ["App."] 1-50.) The Ninth Circuit's initial opinion was published at 636 F.3d 1235 (9th Cir. 2011). (App.51-97.)

The district court's two orders granting petitioner's motion for summary judgment with respect to the claims involved in this matter are not published. (App.98-102 and 103-32.)

JURISDICTION

The Ninth Circuit initially filed an opinion in this case on March 10, 2011. (App.51-52.) Petitioner timely filed a petition for rehearing. On July 13, 2011, the Ninth Circuit issued an order withdrawing its prior opinion and replacing it with an opinion filed that date, and denying the petition for panel rehearing and rehearing en banc. (App.1-2.) On October 11, 2011, petitioner timely filed a petition for writ of certiorari in this Court.

This Court has jurisdiction under 28 U.S.C. §1254(1) to review the July 13, 2011 opinion and judgment of the Ninth Circuit.

STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondents to enforce permit requirements pursuant to provisions of the Clean Water Act (33 U.S.C. §1342(p)), which provides in pertinent part:

> (p) Municipal and industrial stormwater discharges
>
> (1) General rule
>
> Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.
>
> (2) Exceptions
>
> Paragraph (1) shall not apply with respect to the following stormwater discharges:
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering

> methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

The issues raised in the petition and addressed by the Ninth Circuit concern provisions of 40 C.F.R. §122.26 and 33 U.S.C. §1362(12) and (14), which respectively provide in pertinent part:

> 40 C.F.R. §122.26:
>
> (a) Permit requirement.
>
> * * *
>
> (3) Large and medium municipal separate storm sewer systems.
>
> (i) Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems. . . .
>
> (b) Definitions.
>
> * * *
>
> (8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes,

storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

33 U.S.C. §1362. Definitions

Except as otherwise specifically provided, when used in this chapter

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each

means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. . . .

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

STATEMENT OF THE CASE

A. The Clean Water Act's Regulation Of Municipal Stormwater.

In 1972, Congress adopted amendments to the Federal Water Pollution Control Act (33 U.S.C. §1251, *et seq.*). After subsequent amendments in 1977, the statute became known as the Clean Water Act ("CWA" or "the Act"). The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

In the CWA, Congress established a system of permits under the National Pollution Discharge Elimination System ("NPDES") (33 U.S.C. §1342), as one of the means to achieve the CWA's goals. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992).

33 U.S.C. §1342(a)(1) provides that the Administrator of the Environmental Protection Agency ("EPA") may issue an NPDES permit "for the discharge of any pollutant." The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source" or "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft." 33 U.S.C. §1362(12). A "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14).

The EPA Administrator may delegate NPDES permit authority to a state. 33 U.S.C. §1342(b)-(c). California has been delegated this authority. *See* Cal. Water Code §13370. In California, NPDES permits are issued by the State Water Resources Control Board or a Regional Water Quality Control Board. *Id.* at §13377.

Initially, the EPA, by regulation, exempted stormwater uncontaminated by any industrial or commercial activity from NPDES requirements. The Circuit Court of Appeals for the District of Columbia invalidated that regulation, holding that the EPA Administrator did not have the authority to exempt categories

of point sources from Section 402 permit requirements. *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Following this decision, the EPA issued proposed and final rules covering stormwater discharges in 1980, 1982, 1984 and 1985, rules that were challenged at the administrative level and in the courts. *See American Mining Congress v. U.S. E.P.A.*, 965 F.2d 759, 763 (9th Cir. 1992).

In 1987, Congress enacted the Water Quality Act amendments, which established a new statutory scheme for the regulation of stormwater runoff. 33 U.S.C. §1342(p). The amendments set forth dates by which certain categories of stormwater dischargers were required to obtain permits (42 U.S.C. §1342(p)(1) and (2); *Natural Resources Defense Council v. U.S. E.P.A.*, 966 F.2d 1292, 1296 (9th Cir. 1992)) and also enacted special provisions addressing municipal stormwater permits.

The 1987 amendments provided that permits for discharges from municipal storm sewers:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and

> engineering methods, and such other provisions as the Administrator or the State determines appropriate for control of such pollutants.

33 U.S.C. §1342(p)(3). These provisions apply to municipal separate storm sewer systems, sometimes referred to as "MS4s," which are systems that handle only stormwater and not also sewage.[1]

In response to the 1987 amendments, the EPA promulgated extensive regulations governing the content of municipal stormwater permits. 55 Fed. Reg. 47990 (Nov. 16, 1990). Recognizing that it may be impracticable, or undesirable to issue individual permits for MS4s operated by multiple municipalities within the same geographic area, these regulations allowed issuance of a permit covering multiple MS4s. *See* 40 C.F.R. §122.26(a)(3)(i)-(vi).

B. The Permit That Is The Subject Of The Underlying Litigation.

In December 2001, the California Regional Water Quality Control Board, Los Angeles Region, issued an

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[1] In its decision, the Ninth Circuit refers to general municipal separate storm sewer systems as "ms4s," and the municipal separate storm sewer system maintained by petitioner as the "MS4." (*See* App.8 n.2.) For sake of clarity, petitioner will instead follow common practice and use the term "MS4" or "storm sewers" to refer generally to municipal separate storm sewer systems and will specifically indicate when it is referring to its own storm sewers or MS4.

NPDES permit (the "Permit") to 84 cities, the County of Los Angeles and petitioner Los Angeles County Flood Control District ("District"). (1 Joint Appendix, "JA" 52-254.) The purpose of the Permit was to regulate stormwater and urban runoff discharges from each of the 86 municipal storm sewers operated by the permittees. (*Id.*)

The Permit specifically recognized that "[c]ertain pollutants present in storm water and/or urban runoff may be derived from extraneous sources that Permittees have no or limited jurisdiction over." (1 JA 57, Permit ¶ B.2.) The Permit noted also that "Federal, State, Regional or local entities within the Permittees' boundaries or in jurisdictions outside the Los Angeles County Flood Control District, and not currently named in this Order, may operate storm drain facilities and/or discharge storm water to storm drains and watercourses covered by this Order." (1 JA 67, Permit ¶ D.2.) It further recognized the variability of stormwater discharges, finding that "[t]he quality of these discharges varies considerably and is affected by the hydrology, geology, land use, season, and sequence and duration of hydrologic events." (1 JA 56, Permit ¶ B.1.)

Although the Permit was issued to 86 separate entities, under its terms, each permittee was responsible only for its own discharge: "Each Permittee is responsible only for a discharge for which it is the operator." (1 JA 93, Permit ¶ G.4.) This Permit provision is consistent with federal regulation: "*Co-permittee* means a permittee to a NPDES permit that

is only responsible for permit conditions relating to the discharge for which it is operator." 40 C.F.R. §122.26(b)(1); *see also* 1 JA 103, Permit, Part 3 D.1 (providing that the District, designated as principal permittee, "is not responsible for ensuring compliance of any individual Permittee").

The Permit also included a monitoring and reporting program. (1 JA 210-254.) The monitoring and reporting program included several "Core Monitoring" elements, including "mass emissions" monitoring at seven mass-emissions monitoring stations in various river watersheds. (1 JA 219.) The objectives of this mass-emissions monitoring were to estimate "mass emissions" from the storm sewer systems; to assess trends in the mass emissions over time; and, to determine if the storm sewer systems were contributing to exceedances of water quality standards. (*Id.*) While other monitoring was included in the Core Monitoring required under the Permit, the mass-emissions stations monitoring results are the only monitoring results at issue in this case. As respondents admitted in the district court, the mass-emission monitoring stations for the Los Angeles and San Gabriel Rivers are located in the rivers themselves.[2]

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[2] In their Statement Of Genuine Issues Of Material Fact In Dispute filed in opposition to defendants' motion for summary judgment, respondents admitted that both monitoring stations were in the rivers. Defendants' first "uncontroverted" fact stated: "Plaintiffs allege that rainfall and urban runoff that becomes

(Continued on following page)

C. The Lawsuit.

On March 3, 2008, respondents Natural Resources Defense Council, Inc. and Santa Monica Baykeeper filed a complaint against the County of Los Angeles, individual members of its Board of Supervisors in their official capacity, the head of the Los Angeles County Department of Public Works, and petitioner District under 33 U.S.C. §1365(a). Respondents subsequently filed a first amended complaint asserting six claims for relief, with the first four claims alleging that discharges from the County's and petitioner District's storm sewers caused or contributed to exceedances of water quality standards at the mass-emissions monitoring stations in the Santa Clara River, Los Angeles River, San Gabriel River, and Malibu Creek watersheds in violation of Part 2.1 of the Permit. (Ninth Circuit Excerpt of Record "ER" 453-58; *see also* 414, 426, 430-45.) The district court referred to these allegations as the "watershed claims," a term the District will use here as well.

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collected in the flood control system contain pollutants that are in excess of 'water quality standards' adopted by the Regional Board. The plaintiffs base their allegations on samples taken at 'mass emission stations' *located in the Santa Clara River, the Los Angeles River, the San Gabriel River, and Malibu Creek, and on samples taken at Surfrider Beach.*" (District Court Dkt. 140 at 2, Fact No. 1 (emphasis added).) Respondents' response was as follows: "First sentence: Disputed. . . . Second sentence: Undisputed." (*Id.*)

D. The District Court's Decision.

Respondents moved for partial summary judgment against the District with respect to exceedances of water quality standards in the Los Angeles and San Gabriel Rivers. (App.104; ER 9.)[3] Defendants, including the District, moved for summary judgment as to all watershed claims. (App.104-05; ER 9.)

Respondents contended that exceedances measured at the mass-emissions monitoring stations in and of themselves established a violation of the Permit that could be fairly attributable to the District's MS4. (App.117-18.) Defendants, including the District, contended in turn that the mass-emissions monitoring station data could not be used to determine compliance with the Permit (a contention rejected by the district court) and that, in any event, there was no evidence of a "discharge" from defendants' MS4 that violated the Permit. (App.116.)

In an opinion issued March 2, 2010, the district court initially denied both motions for summary judgment as to the watershed claims, concluding that an issue of fact existed as to whether pollutants in discharges from the District's MS4 exceeded the water quality standards set by the Permit. (App.105, 121-22.)

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[3] The parties moved for summary judgment with respect to other claims that are not relevant to this proceeding.

At the same time, the district court rejected respondents' contention that simply because the monitoring stations were within channelized portions of the rivers operated by the District as part of its flood control system, the District was responsible for any exceedances measured there. This was because in order for there to be a "discharge" for which petitioner District could be liable under the CWA, it was necessary that water be discharged from a "point source." The district court noted that this Court had expressly held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), that simply moving water between two portions of the same water body did not constitute a "discharge" from a point source under the Clean Water Act. (App.119.) The district court emphasized that there was no evidence that the Los Angeles River and San Gabriel River below the mass-emissions monitoring stations were bodies of water distinct from the MS4 above the monitoring stations, and found there was no evidence to "show where the MS4 ends and either River begins." (App.119.)

As the district court observed:

> In order for the District's actions to violate Part 2.1 of the Permit, it must be discharging pollutants from a point source. The Court has been presented with no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations.

(App.119.)

The district court ordered the parties to file supplementary pleadings indicating whether there were any facts showing that the standards-exceeding pollutants identified at the mass-emissions monitoring stations had at any time passed through defendants' "outflows"[4] at or near the time the exceedances were observed in the monitoring station monitoring data. (App.122.)

On April 26, 2010, following receipt of supplementary briefing, the district court granted summary judgment to defendants, including petitioner, on all watershed claims. (App.98-99.) The court found that respondents had failed to present evidence that the standards-exceeding pollutants passed through the District's MS4 "outflows" at or near the time the exceedances were observed. (App.100.) The district court further found that respondents provided no evidence that the mass-emissions monitoring stations themselves were located at or near one of petitioner's "outflows." (*Id.*) The court again emphasized that under the Permit, the District could not be held liable for exceedances that may have been caused by discharges from "outflows" maintained by other co-permittees upstream from the mass-emissions monitoring stations. (App.101-02.)

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[4] The district court used the term "outflow" instead of "outfall" which is the regulatory term for the point at which compliance with an MS4 permit's terms is measured with respect to discharges into navigable waters. *See* 40 C.F.R. §§122.26(b)(9) and 122.45(a).

E. The Ninth Circuit's Decision.

Following briefing by the parties and oral argument, on March 10, 2011, the Ninth Circuit issued its published opinion reversing the district court in part, and directing the court to enter summary judgment for respondents as against the District with respect to the watershed claims regarding the Los Angeles and San Gabriel Rivers. (App.51-52, 93-94, 96-97.)

Writing for the court, Judge Smith agreed with the district court that, contrary to respondents' contention, the mere presence of polluted stormwater at the mass-emissions monitoring stations did not *ipso facto* establish petitioner's liability. (App.88-89.) The Ninth Circuit held, however, that the district court had erred in concluding that there had not been a "discharge" under the CWA from the District's MS4 into the Los Angeles or San Gabriel Rivers. The court found that the monitoring stations were in concrete channels maintained by the District and hence, when water exited these channels and flowed into the "naturally occurring" portions of the "rivers," this constituted a "discharge" from an "outfall" for purposes of imposing liability on the District for violation of the Permit. (App.91-92.) The court explained:

> [T]here is evidence in the record showing that polluted stormwater from the MS4 was added to two of the Watershed Rivers: the Los Angeles River and San Gabriel River. Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in a section of

> the MS4 owned and operated by the District, when pollutants were detected, they had *not* yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged into the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state *man-made* construction – not a *naturally occurring* Watershed River.

(App.91-92 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that the MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

(App.92.)

The District timely filed a petition for panel rehearing and rehearing en banc. It noted that the Ninth Circuit's opinion adopted a theory of liability that had not been briefed by the parties, namely that

the District's channelization of portions of the Los Angeles and San Gabriel Rivers where the mass-emissions monitoring stations were located somehow transformed these portions of the rivers from navigable waters into non-navigable discrete portions of the District's MS4, thus creating a "discharge" from an "outfall." As the District explained, this was flatly contrary to uniform statutory and case law holding that artificial channelization of navigable waters does not alter their character for purposes of the CWA. Indeed, as the District observed, Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 769 (2006), noted that the Los Angeles River "has been encased in concrete and steel over a length of some 50 miles."

Moreover, the District noted that the Ninth Circuit's *sua sponte* resolution of the heretofore unbriefed and uncontested issue concerning navigability was directly contrary to the EPA's specific finding (in a report readily available on its website) that the *entire* Los Angeles River, from its mouth to its headwaters, including the channelized portions discussed in the Ninth Circuit opinion, was a "traditional navigable water" of the United States.[5]

Further, the District pointed out that by holding that channelizing portions of the navigable rivers

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[5] http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf (last visited Sept. 2, 2012). The District requested judicial notice of the EPA report.

somehow transformed their character so as to create a discharge from an "outfall" within the meaning of the Clean Water Act, the court had effectively overruled this Court's decision in *Miccosukee Tribe*, since the court was finding a permit violation based on the flow of water within a single navigable body of water.

The Ninth Circuit requested respondents to respond to the petition for rehearing, and respondents did so.

On July 13, 2011, the Ninth Circuit issued its order withdrawing its prior opinion, and issuing a new opinion. (App.1-2.) The only major modification of the prior opinion was to address an argument raised by the parties in their briefing that was not addressed in the prior opinion concerning the appropriate remedy in the event Permit violations were found. (App.37-38.) The court, however, repeated verbatim its reasoning from the prior opinion that the District was liable for a "discharge" from an "outfall" based on the fact that the monitoring stations were within portions of the river that the District had channelized for flood control purposes. (*See* App.44-45, and *compare to* App.91-92.) The court did not address any of the points raised in the petition for rehearing concerning long-standing law that a water body's status as a navigable water for purposes of the CWA is not affected by its channelization or other man-made improvements. It declined to address, let alone reconcile its holding with, the EPA's own determination that the Los Angeles River, including the channelized portions, constituted a "traditional

navigable water," and summarily denied the District's request for judicial notice.

Nor did the Ninth Circuit address this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that there could not be a "discharge" within the Clean Water Act based upon merely transferring water from one portion of a single body of water into another.

SUMMARY OF ARGUMENT

The Clean Water Act regulates the discharge of pollutants into the navigable waters of the United States from municipal storm sewers. It does so by imposing a permit scheme on discharges from municipal storm sewers into navigable waters. 33 U.S.C. §1342(p).

Here, respondents Natural Resources Defense Council, Inc. and Santa Monica Baykeeper sued petitioner Los Angeles County Flood Control District, asserting that the District had violated its municipal stormwater permit by causing exceedances of water quality standards in the Los Angeles and San Gabriel Rivers through discharges from the District's storm sewers. Respondents made no effort to establish that water containing levels of pollutants exceeding those allowed by the Permit was discharged into the rivers through any of the District's storm sewers upstream from the monitoring stations. Instead, respondents argued that they need not show such a discharge; it

was enough that monitoring undertaken at mass-emissions monitoring stations downstream from these storm sewers – monitoring stations which they admitted were located in the Los Angeles and San Gabriel Rivers – indicated the presence of pollutants at levels exceeding the Permit's standards.

Both the district court and the Ninth Circuit rejected respondents' core liability argument, noting that numerous other entities above the monitoring stations also discharged stormwater into the rivers, and that it was necessary for respondents to provide some evidence that the pollutants at issue stemmed from a District storm sewer outfall, and not from another source. Indeed, the district court granted summary judgment to the District on this claim, noting that respondents had not provided any evidence to establish any discharge by the District.

The Ninth Circuit nonetheless reversed, relying on a newly-minted theory of liability, one not argued or relied upon by the parties. Even though respondents admitted that the monitoring stations were located in the Los Angeles and San Gabriel Rivers, the Ninth Circuit held that since the monitoring stations were in channelized portions of the rivers that the District maintained for flood control, water flowing out of those channels into "naturally occurring" portions of the rivers downstream constituted a "discharge" from an "outfall" for purposes of finding a permit violation by the District. In sum, the Ninth Circuit concluded that water flowing from one portion of a river into another portion of the same river

constituted a "discharge" from a "point source" and "outfall" within the meaning of the Clean Water Act.

The Ninth Circuit's construction of the Clean Water Act is untenable and the decision must be reversed. It is directly contrary to basic provisions of the Clean Water Act, the entire regulatory scheme concerning MS4s and the decisions of this Court.

1. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004), this Court held that merely transferring water from one portion of the same body of water to another does not constitute a "discharge" for purposes of the NPDES permit system of the Act. This was consistent with the Act's definition of the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12); 541 U.S. at 102. As this Court observed, merely transferring water from one portion of a body of water to another portion of the same water body does not result in the "addition" of anything to that water body.

The Ninth Circuit's decision is flatly inconsistent with the basic holding of *Miccosukee Tribe*, as it premised a discharge in this case based upon the mere flow of water within the Los Angeles and San Gabriel Rivers. The Ninth Circuit did not address this plain holding of *Miccosukee Tribe* nor offer a principled basis for departing from its strictures.

2. The Ninth Circuit's finding that there may be a "discharge" from channelized portions of a river into

"naturally occurring" portions of a river solely because one portion is man-made, is contrary to uniform statutory, regulatory and case authority making it clear that whether a body of water is man-made or improved is not relevant to the question of whether it is a navigable water of the United States. This Court and the lower federal courts have repeatedly recognized that man-made and improved bodies of water constitute navigable waters of the United States. The mere fact that the channels in question were "man-made" does not alter their character as waters of the United States nor somehow transform them into a "point source" for purposes of a "discharge" from an "outfall" under the Clean Water Act. Hence, there is no basis for the Ninth Circuit's creation, out of whole cloth, of an exception to this well-established principle for portions of navigable waters channelized for flood control purposes.

3. Nothing in the statutory or regulatory scheme concerning municipal storm sewers suggests that a portion of a river channelized for flood control purposes that merely transfers water from one part of a river to another can constitute a "point source" or an "outfall" under the Act. To the contrary – the EPA expressly defined the regulatory term "outfall" to mean a point source "at the point where a municipal separate storm sewer discharges to waters of the United States" and explicitly excluded from the definition of an outfall "conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the

United States." 40 C.F.R. §122.26(b)(9). The improved portions of the Los Angeles and San Gabriel Rivers that the Ninth Circuit found were municipal storm sewers that discharged into navigable waters are "conveyances that connected segments of the same streams and are used to convey waters of the United States" and hence are expressly excluded from the definition of "outfall."

4. Nothing in the legislative history of the Clean Water Act suggests that Congress intended to require an NPDES permit for the mere passage of water through navigable water bodies improved for flood control purposes. Congress did not enact a separate definition of "discharge" with respect to MS4s. Congress instead incorporated the existing definition which makes it clear that there can be no discharge unless there is the "addition" of pollutants, which, as the Court held in *Miccosukee Tribe*, forecloses the finding of a discharge premised upon merely transferring water within a single body of water.

Moreover, a basic principle underlying the Clean Water Act is that pollution is best addressed at its source. The Ninth Circuit's decision, by contrast, imposes liability miles downstream from the source of the pollution based solely on the fact that polluted water has passed through a portion of a river channelized for flood control purposes. Such a holding does little or nothing to address the actual source of pollutants within the channelized portions of the river that may have been discharged into the river by other

entities some distance upstream. That is particularly the case here, where literally hundreds of entities, both public and private, discharge into the Los Angeles and San Gabriel Rivers upstream from the channelized portions of the rivers containing the monitoring stations. None of the purposes of the Act is furthered by finding a "discharge" based solely upon water moving through a channel improved for flood control purposes.

5. Construing the Clean Water Act as imposing responsibility for a discharge based solely upon the flow of water from one portion of a river to another through a portion channelized for flood control purposes will create confusion concerning the regulatory authority of federal and state agencies and impose unintended and unacceptable costs on local entities that must safeguard the life and property of millions of citizens through basic flood control measures.

Under the Clean Water Act, navigable waters and municipal storm sewers, as a point source, are distinct. The status of a body of water as a "navigable water" is the *sine qua non* of the jurisdiction of both the Army Corps of Engineers and the EPA over such waters. Adopting the Ninth Circuit's view means that those portions of the San Gabriel and Los Angeles Rivers that are channelized for flood control become part of the District's MS4, and are not navigable waters. As a consequence, neither the District nor other entities will then be required to obtain a permit from the Army Corps for work within those portions of the rivers, as they are no longer navigable waters.

Likewise, in order to improve water quality, the EPA may specify total daily maximum loads ("TDMLs") for certain pollutants in navigable waters. These TMDLs will not apply to channelized portions of the rivers that would now be separate and distinct from navigable waters. The result is that thousands of miles of improved navigable waters will be stripped of basic protections under the Act, or at the very least be the subject of costly litigation to clarify regulatory authority. Similarly, a holding that portions of rivers channelized for flood control purposes may somehow be regulated both as navigable waters and as MS4s will create confusing, potentially conflicting overlapping regulatory authority, again spawning protracted litigation.

Finally, imposing liability on local entities that may channelize portions of navigable waters for flood control will expose them to substantial liability for "discharges" of pollutants over which they effectively exercise no control. An entity merely channelizing a portion of a navigable water has little or no control over what entities upstream may discharge into the river through their own outfalls. The exposure to this potential liability and multiple additional layers of regulatory compliance will vastly increase the cost of essential flood control protection.

There is no justification for the Ninth Circuit's departure from basic principles of the Clean Water Act and the decisions of this Court. The decision and judgment of the Ninth Circuit should be reversed,

with directions that judgment be reinstated for the District on these claims.

ARGUMENT

THE PROVISIONS OF THE CWA AS CORRECTLY INTERPRETED BY THIS COURT IN *SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE* MAKE CLEAR THAT THE FLOW OF WATER WITHIN A NAVIGABLE WATER IMPROVED FOR FLOOD CONTROL PURPOSES IS NOT A "DISCHARGE" UNDER THE CWA.

The Clean Water Act regulates the addition of pollutants into the waters of the United States. With respect to pollutants in stormwater from storm sewers, the Act provides for the issuance of permits to municipalities on an individual or collective basis concerning discharge from municipal separate storm sewer systems – MS4s. 33 U.S.C. §1342(p)(3); 40 C.F.R. §122.26.

The Ninth Circuit held that respondents had established that the District had discharged pollutants in excess of water quality standards set forth in the Permit, because exceedances were shown by mass-emissions monitoring stations located in portions of the Los Angeles and San Gabriel Rivers that had been improved by the District for flood control purposes. The court did not find that respondents had shown that the District's storm sewer system had

discharged pollutants upstream of the monitoring stations. (App.41-44.) Rather, the court concluded that improvements within the rivers could constitute point sources for purposes of a discharge through an outfall:

> Because the mass-emissions stations, as the appropriate locations to measure compliance, for these two rivers are located in the section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that water was again discharged to the rivers – in both cases, the District. As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intrastate *man-made* construction – not a *naturally occurring* Watershed River.

(App.44 (emphasis added).)

The court continued:

> The discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways.

(App.45.)

As noted, *supra*, footnote 2, respondents admitted in the district court that the monitoring stations

in question were located *in* the Los Angeles and San Gabriel Rivers, respectively. This was not surprising, since as the district court noted in its description of respondents' allegations, the operative complaint specifically alleged that the monitoring stations were within the rivers. (App.117.) The Ninth Circuit itself cited the District's website, which states that the monitoring stations are within the rivers. (App.18 n.4.) Thus, the Ninth Circuit found a discharge from a point source based solely upon water moving through a river improved for flood control purposes, or, in other words, a discharge from a point source based upon the mere flow of water within a single body of water.

The Ninth Circuit's decision runs afoul of basic jurisdictional provisions of the CWA's NPDES Permit System which require the "addition" of a pollutant for purposes of a discharge and that any discharge occur from a point source – principles made clear by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The Ninth Circuit's decision is untenable and must be reversed.

A. The Ninth Circuit Decision Must Be Reversed Because It Is Contrary To The Provisions Of The CWA And This Court's Decision In *Miccosukee Tribe* Making It Clear That Mere Transfer Of Water Between Two Points Of A Single Body Of Water Cannot Constitute The "Addition Of Pollutants" To A Navigable Water Of The United States For Purposes Of A Discharge Under 33 U.S.C. §1362(12).

The issue before the Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), was whether the flow of water from a canal, through a pumping station and into a reservoir, required a discharge permit under the NPDES. 541 U.S. at 98-99. The lower courts had held that a permit was required, concluding that the two bodies of water – the canal and the reservoir – were distinct. *Id.* at 99.

Among the issues before this Court was whether a "point source" needed to be the original source of a pollutant in order to require a permit for discharging pollutants into waters of the United States. *Id.* at 105. The Court rejected that reading of the Act, concluding that "discharge of a pollutant" under 33 U.S.C. §1362(12) "includes within its reach point sources that do not themselves generate pollutants." *Id.*

However, the Court agreed with the parties, that if the canal and reservoir were in fact not distinct

bodies of water "but instead are two hydrologically indistinguishable parts of a single water body," no permit would be required because no "discharge" had occurred. *Id.* at 109-10. This was consistent with the CWA's definition of the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12); 541 U.S. at 102. Merely transferring water from one portion of the same body of water to another does not result in the "addition" of anything. As the Court explained:

> The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in [*Catskill Mountains Chapter of*] *Trout Unlimited*[, *Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)], "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot."

Id. at 109-10.

Because the record did not contain enough information for the Court to determine whether the canal and reservoir were a single body of water, or distinct bodies of water, the Court remanded for further proceedings. 541 U.S. at 112.

In *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), the Court

reaffirmed that "[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a 'discharge of a pollutant' within the meaning of §402 [citation] and the Court accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants'. . . ." 547 U.S. at 381.

Consistent with the provisions of §1362(12) and *Miccosukee Tribe*, the courts, at the federal government's urging, have held that mere transfer of water within a single navigable body does not constitute a discharge. *See, e.g., National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (no NPDES permit required for discharge of water from dam where no pollutant added to the water and noting the EPA's position that a pollutant is "added" when it is introduced into a water from the "outside world" by a point source); *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (no NPDES discharge occurred for permit purposes based upon transfer of water from reservoir through power turbines into Lake Michigan since water was simply transferred back and forth between the reservoir and lake).

Similarly, in adopting its water transfer rule (40 C.F.R. §122.3(i)),[6] the EPA has taken the position that a mere transfer of waters of the United States without subjecting the water to intervening industrial, municipal or commercial use does not constitute a discharge for purposes of an NPDES permit, citing the statutory definition of "discharge." 73 Fed. Reg. 33697, 33700 (June 13, 2008). The EPA has stated that it "believes that an addition of a pollutant under the Act occurs when pollutants are introduced from outside the waters being transferred." *Id.* at 33701.

In holding that the District was liable for permit violations based upon waters of the Los Angeles and San Gabriel Rivers passing through the concrete channels within the rivers, the Ninth Circuit cited *Miccosukee Tribe* but did so only in the context of asserting that it was not necessary to show that the District's MS4 generated the pollutants. (App.46-47.) Thus, while the court correctly cited *Miccosukee Tribe* for the proposition that a "discharge of a pollutant" as defined by 33 U.S.C. §1362(12) includes point sources that do not themselves generate pollutants, the court

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[6] 40 C.F.R. §122.3(i) provides as follows:

Exclusions.

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

flatly ignored the basic premise of *Miccosukee Tribe* – that a mere transfer, or flow, of water between two points of a single body of water cannot constitute the "addition of pollutants" to a navigable water of the United States.

The Ninth Circuit's failure to follow *Miccosukee Tribe*'s holding and the plain language of 33 U.S. §1362(12) can only be ascribed to its statement that the monitoring stations within the improved portions of the rivers were distinct "as a matter of law and fact" because "the MS4 is an intra-state man-made *construction* – not a *naturally occurring* Watershed River." (App.44 (emphasis added).) Thus, it appears that the Ninth Circuit deemed improved portions of the rivers to be separate from downstream portions of the rivers based upon a particular physical fact, i.e., that the channelized portions of the river were "man-made" and not "naturally occurring," and that because the channelization occurred for flood control purposes and the monitoring stations placed as part of the MS4 permit, that the legal status of the channelized portions of the river somehow made them distinct from the navigable waters themselves for purposes of creating a discharge from a point source under the CWA.

Yet, neither the man-made nature of the channelized portions of the river, nor provisions of the CWA, nor applicable regulations concerning MS4s justify the Ninth Circuit's departure from *Miccosukee Tribe*.

B. The Ninth Circuit's Conclusion That Man-Made Alterations To A Navigable Water May Change Its Character For Purposes Of The Clean Water Act Is Unsupported By The Act Itself And Relevant Regulations.

The Clean Water Act regulates the addition of pollutants to "navigable waters" which is defined by 33 U.S.C. §1362(7), as meaning "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). The Act's implementing regulations in turn, define "waters of the United States" to mean:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (b) All interstate waters, including interstate "wetlands";
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, west meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for

> industrial purposes by industries in interstate commerce;
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraph (a) through (f) of this definition.

40 C.F.R. §122.2.

Although the Ninth Circuit cited this regulation to support its conclusion that the man-made nature of the portions of the channels located in the Los Angeles and San Gabriel Rivers somehow altered the rivers' status as navigable waters so there could be a discharge from the District's MS4 within the meaning of the Clean Water Act, the language of the regulation belies that construction. Nowhere in 40 C.F.R. §122.2 is it stated that a navigable water must be free of man-made improvements. Indeed, nowhere is there any reference to a "naturally occurring" body of water. (*Compare* 40 C.F.R. §122.2 *to* App.44.)

The Ninth Circuit cites no case holding or even suggesting that the status of a body of water as a navigable water changes depending upon whether it has been subject to man-made improvements. While

the court cited *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001), nothing in that decision supports the strained proposition urged by the Ninth Circuit. In fact, in *Headwaters*, the Ninth Circuit found that man-made irrigation canals were "waters of the United States." 243 F.3d at 533.

This Court, in *Rapanos v. United States*, 547 U.S. 715 (2006), although divided on the construction of the phrase "waters of the United States," uniformly recognized that man-made bodies of water could constitute such waters under the Act. As the plurality observed, "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal.'" 547 U.S. at 736 n.7. Indeed, in his concurring opinion, Justice Kennedy invoked the Los Angeles River as emblematic of a "water of the United States" and highlighted the fact that it was subject to man-made improvements for virtually all of its length:

> The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. [Citation.] Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles.

Id. at 769.

The Court's recognition that "navigable waters of the United States" necessarily included man-made or improved water bodies is not surprising. This Court

has found that improved waterbodies are "navigable waters," in defining Congress' regulatory authority under the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979) (private pond, dredged and opened to navigable waters, is a navigable water). *See also, United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407-08 (1940) (error to determine navigability based on natural conditions only; a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids are required before commercial navigation may be undertaken).

Moreover, the regulations implementing the Rivers and Harbors Act, 33 U.S.C. §401, *et seq.*, provide that artificial channels, even those that are a "major portion" of a river, can constitute a navigable water of the United States. 33 C.F.R. §329.8(a)(1)-(2). The regulations also provide that a water body which was "navigable in its natural or improved state . . . retains its character as 'navigable in law' even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions." 33 C.F.R. §329.9(a).

The lower federal courts have similarly recognized that navigable waters are not limited to unaltered "naturally occurring" bodies of water. In *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), the court held that a drainage ditch into which the defendant had discharged industrial wastewater was a "navigable water" of the United States within the meaning of the CWA. 108 F.3d at 1339-40. The court

rejected the contention that because the drainage ditch was man-made, it could not constitute a water of the United States for purposes of the Act:

> There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes. The fact that bodies of water are "man-made makes no difference. . . . That the defendants used them to convey the pollutants without a permit is the matter of importance."

108 F.3d at 1342.

Similarly, in *United States v. Vierstra*, 803 F. Supp. 2d 1166 (D.Idaho 2011), *aff'd*, 2012 WL 3269211 (9th Cir. Aug. 13, 2012), the court held that a man-made canal constituted a water of the United States because it met both the plurality standard of *Rapanos* as well as the "significant nexus" requirement of Justice Kennedy's concurring opinion. 803 F. Supp. 2d at 1168-70. In *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), applying *Rapanos*, the court held that a man-made creek constituted a water of the United States for purposes of the Act. 496 F.3d at 988-91.

There is simply no support for the Ninth Circuit's statement that there may be a discharge from a point source under the CWA based solely on the fact that water has flowed from an improved "man-made" portion of a river into a purportedly "naturally occurring" portion of the same river. Nor, as we discuss, do

the statutes and regulations concerning MS4s suggest that mere transfer of water through a navigable water improved for flood control purposes into another portion of the same river can constitute a discharge from a point source under the CWA.

C. None Of The Statutory Or Regulatory Provisions Concerning MS4s Suggests That Mere Flow Of Water From One Portion Of A River Through A Channel Improved For Flood Control Purposes Into Another Portion Of The River May Constitute A Discharge From A Point Source Under The CWA.

As noted, the Ninth Circuit concluded that the channelized portions of the river containing the monitoring stations were somehow distinct from the navigable waters because they were "man-made" and "intra-state" constructions maintained for flood control and part of the District's MS4. Implicit in the Ninth Circuit's statement is the suggestion that an MS4 may be coextensive with a navigable water; that is to say, when a river is channelized or otherwise altered for flood control purposes, it becomes part of an MS4, and hence somehow distinct from the river itself for purposes of a discharge under the CWA.

The Ninth Circuit's reasoning does not withstand scrutiny. There is no suggestion in the statutory scheme that for purposes of a discharge, an MS4 and a navigable water can be one and the same. To the contrary, as the EPA noted in the preamble to the

initial proposed MS4 regulations, MS4s and navigable waters are distinct:

> In addition to identifying outfalls from municipal storm sewer systems for the development of a management program to reduce pollutants in storm water discharges, it is also important to identify the locations of such outfalls to clarify *where the storm sewer ends and where waters of the United States begin. In many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.* Permit applicants should refer to the regulatory definition of waters of the United States at 40 C.F.R. 122.2 for appropriate guidance.

53 Fed. Reg. 49416, 49453 (Dec. 7, 1988) (emphasis added).

To be sure, as the district court recognized (App.119), it may be difficult as both a factual and legal matter to discern where the rivers leave off and where the District's MS4 begins. And, District personnel have referred generally to channelized portions of the Los Angeles and San Gabriel Rivers as being part of the District's MS4, given that improvements in the river indisputably were undertaken for flood control purposes. Even the United States, in its Brief as Amicus Curiae at the petition stage, conflated the MS4s with the rivers, stating that "the portions of the MS4 that contain the relevant monitoring stations actually lie within . . . the Los Angeles

and San Gabriel Rivers." (Brief for United States as Amicus Curiae ("BFUS") at 14-15.)[7] Nevertheless, the District has, consistent with the CWA, the underlying regulations and the terms of the Permit, consistently argued that there is no "discharge" within a channelized river itself, and pointed out that respondents had failed to establish any exceedances from discharges from the District's MS4 outfalls into the rivers at or upstream of the monitoring stations.

By regulatory definition, an MS4 must be distinct from waters of the United States for purposes of a discharge. 40 C.F.R. §122.26(b)(8) defines a "municipal separate storm sewer" as a publicly owned "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)," "designed or used for collecting or conveying storm water," that "*discharges to waters of the United States.*" *Id.* (emphasis added).

Without a doubt, channelization of the Los Angeles and San Gabriel Rivers created a system "designed or used for collecting or conveying storm water." 40 C.F.R. §122.26(b)(8)(ii). The channels,

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[7] The United States, however, correctly concluded that the "discharges" had already occurred "from upstream MS4 outfalls" and that the Ninth Circuit was "mistaken" in determining that "polluted stormwater flowing through the monitoring stations was *later* discharged from the MS4 into the rivers." (BFUS at 15 (emphasis in original).)

however, do not "discharge[ ] to waters of the United States" – they *are* waters of the United States.

The clear distinction between MS4s and navigable waters for purposes of a discharge is fundamental to the implementation of the stormwater program. The foundation of permit compliance is measurement at an "outfall." 40 C.F.R. §122.45(a). Significantly, the EPA has expressly defined "outfall" from an MS4 as *excluding* the mere transfer of water within a navigable water. 40 C.F.R. §122.26(b)(9) defines "outfall" as:

> a point source as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and *does not include* open conveyances connecting two municipal separate storm sewers, or pipes, tunnels *or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.*

40 C.F.R. §122.26(b)(9) (emphasis added).

A navigable water improved for flood control clearly falls outside the definition of "outfall," since it merely connects segments of the same stream or other waters of that navigable water body and is used to convey waters of the United States.

The definition of MS4s as point sources distinct from, and not coextensive with, waters of the United States reflects the basic definitional foundations of the CWA, which, as Justice Scalia noted for the

plurality in *Rapanos v. United States*, 547 U.S. at 735, "conceive of 'point sources' and 'navigable waters' as separate and distinct categories."

Consistent with *Miccosukee Tribe*, the applicable regulations make it clear that for purposes of imposing liability for "discharge of a pollutant" in violation of 33 U.S.C. §1311(a), it is necessary to establish that there was an "addition of any pollutant to navigable waters from any point source" under 33 U.S.C. §1362(12) and there can be no such "addition" by simply transferring water within a single navigable water of the United States. The Ninth Circuit was not free to discard the statutory definition of "discharge." As this Court recognized in *S.D. Warren Co. v. Maine Board of Environmental Protection,* 547 U.S. 370, the CWA is a statute whose technical definitions were worked out with great effort in the legislative process. *Id.* at 380, citing H. R. Rep. No. 92-911 (1972) ("[I]t is extremely important to an understanding of [§402] to know the definition of various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants' ").

A "discharge" from an MS4 occurs only when water is discharged from an "outfall" into the navigable waters. Petitioner's pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of "outfall" and are therefore subject to the Clean Water Act's proscriptions. Yet, as both the district court and Ninth Circuit recognized

here, respondents – despite multiple opportunities – made no effort to establish exceedances attributable to water flowing from the District's MS4 outfalls discharging into either river. The Ninth Circuit's finding of a discharge based solely upon the flow of water from one part of a river into another part of the same river is flatly inconsistent with the provisions of the CWA defining "discharge," and other applicable statutes and regulations concerning MS4s. The Ninth Circuit judgment must be reversed.

D. Nothing In The Legislative History Of The CWA Supports Finding A Discharge Based Upon The Mere Flow Of Water Through A Navigable Water Improved For Flood Control Purposes, And Such A Construction Is Contrary To The Legislative Purpose Underlying The CWA – To Address Pollutants At Their Source.

Nothing in the legislative history underlying the provisions of the CWA concerning MS4s even remotely suggests that Congress intended to regulate the "discharge" of pollutants by regulating water simply flowing through a channelized portion of a river. As a threshold matter, Congress did not carve out a separate definition of "discharge" with respect to permit requirements for MS4s; rather, it incorporated the Act's definition of "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source. . . ." 33 U.S.C. §1362(12). Not surprisingly, this definition was specifically incorporated

in the Permit. (1 JA 173-174.) As the Court observed in *Miccosukee Tribe*, the requirement that there be an "addition" of a pollutant to navigable waters forecloses any interpretation of the phrase to include simply moving water within a single water body. Had Congress intended to somehow submit flood control channels within navigable waters to the permit requirements of the CWA, it would not have incorporated the existing definition of "discharge" as requiring the "addition" of pollutants to a body of water.

In contrast, when Congress intended to treat MS4s differently than other entities regulated under the Act it did so in unmistakable fashion. For example, industrial stormwater dischargers must meet all applicable requirements of 33 U.S.C. §1342 and 33 U.S.C. §1311. 33 U.S.C. §1342(p)(3)(A). However, municipal stormwater dischargers are not required to meet these requirements, but instead must meet only the "more flexible" requirements set forth in 33 U.S.C. §1342(p)(3)(B). *City of Abilene v. U.S. E.P.A.*, 325 F.3d 657, 659-60 (5th Cir. 2003).

More fundamentally, in enacting the CWA, Congress generally intended that pollutants be controlled at the source whenever possible. *See* S. Rep. No. 92-414, p. 77 (1972) (definition of navigable waters should be broad because it is "essential that discharge of pollutants be controlled at the source"). Yet, finding a discharge of pollutants based solely upon water passing through a channel within a river and the resulting imposition of liability on the entity

maintaining the channel, does nothing to address the actual source of pollutants.

For example, 42 separate incorporated cities within the Los Angeles River Watershed discharge to the river upstream of the mass-emissions monitoring station. (Ninth Circuit Supplemental Excerpt of Record "SER" 229.) In the San Gabriel River Watershed, at least 276 industrial and 232 construction stormwater dischargers were permitted to discharge upstream of the mass-emissions monitoring station during the relevant time period, along with more than 20 separate incorporated cities. (SER 218, 229.) Any, or perhaps all of these other entities may be responsible for discharging pollutants from outfalls that exceeded the Permit's water quality standard requirements, yet imposing liability on the District premised upon the mere presence of polluted water in the District's downstream channelized portions of the rivers does nothing to ameliorate the discharge of pollutants by such entities.[8]

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[8] This is why it has been the District's position (supported by the plain language of the Permit) that the mass-emission monitoring stations in fact were not designed to measure the compliance of any individual permittee's MS4 upstream from the monitoring stations, but rather, simply to measure the general "health" of the rivers. Detection of exceedances at the monitoring stations does not provide any information as to which of any of the multitude of entities discharging into the rivers through MS4 outfalls upstream of the stations may have added the pollutants. The district court disagreed in part, concluding that the monitoring stations could be used to determine the compliance

(Continued on following page)

Nor does it make sense to affix responsibility on the District to somehow address these exceedances, since it is not within the District's power to control what flows from the outfalls of the multitude of upstream entities. Unlike the context of an industrial permit, where polluted water may be treated at its source and the discharger can make the choice either to treat or stop the discharge, as Congress recognized in enacting the CWA, municipal stormwater does not lend itself to traditional "end-of-the-pipe" treatment technology.[9] Indeed, recognizing the more flexible and

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of an individual permittee, but only insofar as respondents could somehow show a discharge from an outfall in close enough proximity to the monitoring station to establish that the water flowing from the outfall exceeded permit standards. As the district court noted, despite two opportunities to do so, respondents never showed any such exceedances from any MS4 outfall of the District at or near the monitoring stations. (App.100.)

[9] In addressing the type of pollution control programs that will be required by municipal storm water permittees under 33 U.S.C. §1342(p)(3)(B)(iii), EPA stated:

> When enacting this provision, Congress was aware of the difficulties in regulating discharges from municipal separate storm sewers solely through traditional end-of-pipe treatment and intended for EPA and NPDES States to develop permit requirements that were much broader in nature than requirements which are traditionally found in NPDES permits for industrial process discharges or POTWs. The legislative history indicates, municipal storm sewer system's "permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge."

55 Fed. Reg. 47990, 48037-38 (Nov. 16, 1990) (quoting Vol. 132 Cong. Rec. S16425).

comprehensive approach to this problem, the EPA has encouraged system-wide permits of the sort at issue here rather than separate permits for municipal stormwater permittees. 40 C.F.R. §122.26(d); 55 Fed. Reg. at 48043.

There is no indication that Congress contemplated, let alone intended, to require a public entity that has improved a navigable water for basic flood control protection to incur the substantial cost of building and operating water treatment facilities solely to treat exceedances as a result of stormwater flowing through a portion of the river in which it operated flood control channels, notwithstanding the fact that pollutants may have been added by other entities far upstream.[10] Whatever measures may be taken by a permittee to address exceedances in stormwater, as a basic proposition it makes sense that they be undertaken by the entity that can control the addition of that pollution, not an entity that is simply downstream with no control over that addition.

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[10] The impracticalities of such an approach in the context of the Los Angeles and San Gabriel Rivers is particularly apparent given that the rivers are a feast or famine proposition – running at barely a trickle during summer months, but flowing to capacity during torrential rains. *See, e.g., Rapanos v. United States*, 547 U.S. at 769 (Kennedy, J., concurring) (observing that the Los Angeles River varies from a "trickle" to having "water volumes" that are "powerful and destructive").

Nothing in the general provisions of the CWA, nor any of its specific provisions concerning MS4s, evinces any congressional intent that a public entity be held responsible for a discharge of pollutants premised solely upon the flow of water through a navigable water improved for flood control purposes, and imposition of liability on such a basis runs counter to the Act's underlying principle that pollutants be addressed at their actual source. For this reason too, the Ninth Circuit's decision is untenable and must be reversed.

E. Permitting A "Discharge" To Be Premised On Mere Flow Of Water Through A Portion Of A River Improved For Flood Control Purposes Blurs The Distinction Between Navigable Waters And MS4s, Creating Confusion With Respect To The Regulatory Authority Of Federal Agencies And Imposing Substantially Increased Costs On The Agencies Engaged In Basic Flood Control Planning.

As noted, based upon the provisions of the Clean Water Act and regulations concerning MS4s, MS4s are distinct from navigable waters. Yet, affirming the Ninth Circuit's decision and finding a discharge here based upon the mere transfer of water through channels improved for flood control purposes, would inevitably blur the distinction between MS4s and navigable waters. This will have a profound adverse

effect on federal, state and local agencies engaging in pollution control and flood protection.

First, if, as the Ninth Circuit states, portions of a river improved for flood control purposes are somehow distinct from "naturally occurring" portions of the river, the fundamental authority of federal agencies over such improved portions of a river is called into question. This is because the authority of the EPA and the Army Corps of Engineers under the Act is derived from the status of water bodies as navigable waters.

For example, the EPA has the authority to adopt new and modified water quality standards in "the navigable waters involved" if water quality standards submitted by a state are not consistent with applicable requirements of the Act or the Administrator determines that a revised or new standard is necessary to meet the Act's requirements. 33 U.S.C. §1313(c)(4). Further, both the EPA and states with delegated authority can adopt "total maximum daily loads" (TMDLs) for navigable waters where effluent limitations are not stringent enough to achieve water quality standards for such waters. 33 U.S.C. §1313(d).

Likewise, under the Act, the Army Corps of Engineers issues permits for the discharge of dredged or fill material into "navigable waters," 33 U.S.C. §1344(a). Persons subject to these permits also are required to obtain a "certification," pursuant to 33 U.S.C. §1341, from the state that the discharge will

meet the requirements of §§1311, 1312, 1313, 1316 and 1317 of the Act. Such certification may "set forth any effluent limitations and other limitations, and monitoring requirements" to assure that the applicant will comply with the Act. 33 U.S.C. §1341(d).

If improvements to a traditional navigable river render the improved sections an MS4, distinct from the original navigable water, the EPA loses its authority to adopt new water quality standards and TMDL programs for those sections, and the Corps and states lose their authority to require permits and certifications for discharges of dredged and fill material into the improved channels. The result is that thousands of miles of improved flood control channels that also are navigable waters of the United States will be stripped of basic protections under the CWA. This will also necessarily spawn litigation, as local entities must inevitably contest application of now unnecessary additional layers of regulation over such improved portions of rivers or other bodies of water previously regarded as "navigable waters."

Second, a determination that a portion of a river or other navigable water improved for flood control purposes can be regulated as both an MS4 and a navigable water, will have equally pernicious consequences. It will create confusion concerning overlapping and potentially conflicting layers of regulatory responsibility, again triggering protracted and costly litigation.

The plain fact is that any blurring of the distinction between MS4s as a point source and navigable waters invariably spawns confusion and will necessarily increase the cost of flood control planning and implementation. Cities, counties and flood control agencies will have to take into account potential liability for MS4 "discharges" of pollutants through an improved portion of a river, even if the local agency does not operate a MS4 system. The agencies will further have to consider the hefty costs of regulatory compliance, a difficult task in the best of circumstances, but one made infinitely more complex by adding still additional layers of regulatory authority and even more punishing on the public fisc given the inevitable need to determine, likely through costly litigation, precisely which agency regulates what stretch of the channels.

The Ninth Circuit's decision is bad law and worse policy. It does nothing to further the basic purposes underlying the CWA, nor management of storm water through MS4s, while imposing substantial, unnecessary costs on the crucial public service of flood control. The decision and judgment of the Ninth Circuit should be reversed.

CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions that judgment for petitioner be reinstated.

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RESPONDENT'S BRIEF

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No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

The Court granted certiorari limited to Question 2 presented by the petition (Pet. i):

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

In defense of the judgment below, respondents also address the following question:

> Whether a discharger can escape liability for violations of a Clean Water Act permit that covers multiple dischargers on the ground that the permit's monitoring requirements do not pinpoint the precise contribution of each discharger to the documented permit violations, when the Act requires all permits to include monitoring sufficient to establish a permittee's compliance with permit limits and this permit's monitoring was expressly designated for that purpose and requested by petitioner itself.

RULE 29.6 STATEMENT

The disclosures in respondents' brief in opposition to the petition for writ of certiorari remain accurate.

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INTRODUCTION

Respondents agree with petitioner and the United States on the answer to the question presented by the petition: the transfer of water through a concrete channel within a single river does not constitute a discharge of pollutants from a point source under the Clean Water Act. As respondents explained in opposing certiorari, to the extent the court of appeals' opinion suggests otherwise, it is incorrect. The answer to the question petitioner presents, however, has no bearing on petitioner's liability and does not resolve this case, because petitioner does not simply transfer water within a single river.

Petitioner concedes that it is properly regulated by a Clean Water Act permit because it discharges pollutants from storm sewer outfalls into waters of the United States. That permit prohibits any stormwater discharges that contribute to violations of water quality standards. In accordance with the Clean Water Act and implementing regulations, the permit also requires petitioner to monitor its compliance with permit limits and report the results.

The undisputed results of petitioner's compliance monitoring demonstrate persistent violations of water quality standards, thus establishing petitioner's liability as a matter of law. The permit's monitoring program was proposed by petitioner itself, and petitioner's attempt to evade liability by contesting the sufficiency of its compliance monitoring is an improper

collateral attack on the permit – a permit the state courts have already reviewed and upheld.

The Court should therefore affirm the judgment of the court of appeals.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

I. Background

A. Stormwater Pollution In Los Angeles County

Urban stormwater runoff is surface water generated by rainstorms that flows over parking lots, streets, commercial sites, and other developed land in urban areas. Pet. App. 6. As it moves across impervious surfaces, this runoff picks up toxic metals, fecal bacteria, and other pollutants. Pet. App. 6; 64 Fed. Reg. 68,722, 68,725 (Dec. 8, 1999). Municipal storm sewer systems collect and channel the polluted stormwater into drains and sewer pipes that ultimately discharge the runoff without treatment into receiving waters such as lakes, rivers, and the ocean. Pet. App. 7-8.

Stormwater runoff is a major cause of water quality impairment nationwide, 64 Fed. Reg. at 68,726, and is now the principal source of water pollution in California. Pet. App. 6; JA 432. The Los Angeles area "faces the largest concentration of such pollution" in the state. C.A. ER 302 (State Water Res. Control Bd. Resolution No. 2003-0013). Toxic plumes from stormwater runoff persist for days and are detected miles off the coast of Los Angeles County in the open ocean. JA 361.

Fecal bacteria and other pathogens in stormwater runoff harm human health. Illness rates increase significantly among those who swim at beaches near stormwater discharge points. 64 Fed. Reg. at 68,727. In Los Angeles County, people swimming at beaches near storm drain outfalls face a one in twelve chance of developing "significant respiratory disease."[1] By some estimates, more than a million people become sick each year because of stormwater pollution in southern California. C.A. ER 344.

Stormwater discharges in Los Angeles County also impose substantial economic costs. JA 362. Increased health care costs from runoff-induced human illness cause annual economic losses of tens of millions of dollars to the region. C.A. ER 344-350.

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[1] U.S. General Accounting Office, GAO-01-679, *Water Quality: Better Data and Evaluation of Urban Runoff Programs Needed to Assess Effectiveness* 24 (2001), *available at* http://www.gao.gov/new.items/d01679.pdf.

Polluted runoff results in regular beach closures that impair the region's multi-billion dollar coastal tourism economy. JA 362. This pollution also causes ecological harm to inland rivers that serve as wildlife habitat and provide recreational opportunities for Los Angeles communities, including at riverside urban parks. *See* JA 362.

B. The District's Municipal Separate Storm Sewer System

A municipal separate storm sewer system, referred to as an MS4, is a publicly-owned collection of storm drains, pipes, outfalls, and other infrastructure that collects stormwater runoff and discharges it to navigable waters without treatment. 40 C.F.R. § 122.26(b)(8). Petitioner the Los Angeles County Flood Control District (petitioner, or the District) operates an MS4 with thousands of discharge points, known as outfalls, that discharge the pollutants that collect in stormwater, including fecal bacteria, arsenic, cyanide, mercury, copper, lead, and zinc. Pet. App. 6-8, 17. The MS4 discharges literally tons of these pollutants to rivers and to the Pacific Ocean every year through pipes, drains, outfalls, and other discrete conveyances. JA 360.

The District's MS4 is an "incredibly complex" system. JA 333. The District has referred to the welter of interconnected storm sewer pipes and drains in its MS4 as "spaghetti." JA 293. The District's maps depict the "complicated web" of storm

drains that discharge into rivers within the County, including the Los Angeles River and San Gabriel River. Pet. App. 106.[2]

Los Angeles County and 84 cities within the County operate additional municipal storm drains that connect to the District's MS4. Pet. App. 6-8. This combined system is "highly interconnected because the District allows each municipality to connect its storm drains to the District's extensive flood-control and storm-sewer infrastructure (the MS4)." Pet. App. 8 (internal quotation omitted). This interconnected MS4 commingles stormwater from many dischargers to a "massive[]" extent, JA 333, and "the number and location of storm drains are too numerous to catalogue." Pet. App. 8. The District alone owns and operates approximately 2,800 miles of storm drains and 500 miles of open channels – more of the MS4 infrastructure than all of the other entities combined. Pet. App. 106.

In addition to the gutters, underground pipes, and outfalls that discharge into the Los Angeles and San Gabriel Rivers, the MS4 also makes use of stretches of each river to convey stormwater to the

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[2] The District's partial storm drain maps are public documents and are attached to this brief for ease of reference. *See* App. 17a-18a (Cal. Reg'l Water Quality Control Bd., Los Angeles Region, Tentative Order No. R4-2012-XXXX, Att. C, Figs. C-4 & C-5, *available at* http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Attachment%20C%20-%206-6-12.pdf).

ocean. The complete length of the Los Angeles River has been channelized for flood control purposes.[3] This includes portions that are entirely lined in concrete, portions with concrete banks and an unlined river bottom, and portions with improved earthen banks and an unlined river bottom. The San Gabriel River has also been channelized and parts of the river lined with concrete, although not to the same extent.[4]

C. Stormwater Regulation Under The Clean Water Act

1. The NPDES Permit Program

The Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The law forbids any person to discharge any pollutant from a point source into navigable waters, unless expressly authorized. *Id.* §§ 1311(a), 1342, 1362(12). A person who seeks to discharge any pollutant into navigable waters must apply for and comply with the terms and limits of a National Pollutant Discharge

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[3] EPA Region IX, *Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional Navigable Water* 8-9 (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf.

[4] *See* County of L.A. Dep't of Public Works, *San Gabriel River Corridor Master Plan* 2-30 (June 2006), *available at* http://dpw.lacounty.gov/wmd/watershed/sg/mp/docs/SGR_MP-Chapter2-3.pdf.

Elimination System (NPDES) permit. *Id.* §§ 1311(a), 1342(a)(1); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

The term "point source" is defined to mean "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or] tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). That definition includes "point sources that do not themselves generate pollutants." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (the definition "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' ").

The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). It includes the addition of pollutants from "surface runoff which is collected or channelled by man" and "discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2.

A violation of an NPDES permit is a violation of the Clean Water Act. *Id.* § 122.41(a) ("Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action."). The statute imposes strict liability: a discharger's intent, good faith, or lack of knowledge is irrelevant to establishing civil liability for permit violations. *Am. Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540

(4th Cir. 2005) ("[T]he CWA creates a regime of strict liability for violations of its standards.").

2. Regulation Of Municipal Stormwater Discharges

Congress amended the Clean Water Act in 1987 to require regulation of MS4s through the NPDES program. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69-71 (1987). EPA originally promulgated regulations in 1973 to exempt MS4 discharges from that program. 38 Fed. Reg. 18,000, 18,003 (July 5, 1973); *see Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). At the time, EPA argued that requiring NPDES permits for stormwater discharges from MS4s would be administratively infeasible. *Costle*, 568 F.2d at 1377, 1380. The D.C. Circuit invalidated the rule and held that, under the Clean Water Act, EPA lacked discretion to exempt entire categories of point sources from the NPDES permitting requirements. *Id.* at 1377. EPA published regulations pertaining to municipal stormwater discharges on four subsequent occasions, but none was successfully implemented. *See* 56 Fed. Reg. 56,548, 56,548 (Nov. 5, 1991). Congress enacted the Water Quality Act of 1987 to regulate stormwater discharges from MS4s "after continued nonfeasance by the EPA." Pet. App. 29.

As amended, the statute directs that discharges from an MS4 serving a population of 100,000 people or more require NPDES permits. 33 U.S.C.

§ 1342(p)(2)(C)-(D). Discharges from smaller MS4s require a permit only if "the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States," *id.* § 1342(p)(2)(E), and as otherwise directed by EPA through regulation, *id.* § 1342(p)(6). The statute phased in these permit requirements for MS4s over a period of several years. *Id.* § 1342(p)(4). The amendments focused the application of the NPDES program on the most harmful sources of stormwater pollution.

Congress imposed the NPDES permitting requirement for urban stormwater runoff at the municipal level, *id.* § 1342(p)(2)(C)-(D), rather than directing EPA to regulate "individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare')," Pet. App. 31 (citation omitted). Congress further provided that permits for discharges from an MS4 "may be issued on a system- or jurisdiction-wide basis" when a number of entities operate an interconnected storm sewer system. 33 U.S.C. § 1342(p)(3)(B)(i); *see* 40 C.F.R. § 122.26(d). System-wide permitting eliminates the need to regulate each MS4 outfall with a separate permit, and jurisdiction-wide permitting allows several local governments to apply for a single permit to govern an interconnected MS4 discharging to the same waters of the United States. 53 Fed. Reg. 49,416, 49,451 (Dec. 7, 1988).

Issuing MS4 permits "on a system-wide or jurisdiction-wide basis" provides "an important mechanism for developing the comprehensive storm water management programs envisioned by the Act." 55 Fed. Reg. 47,990, 48,043 (Nov. 16, 1990). Where multiple entities seek to be regulated through a single permit, each must have adequate legal authority to "[c]ontrol through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system." 40 C.F.R. § 122.26(d)(2)(i)(D).

Each MS4 outfall (or discharge point) is a point source under the Clean Water Act. 33 U.S.C. §§ 1342(p), 1362(14); 40 C.F.R. § 122.26(b)(9) (defining outfall). Federal regulations interpret the term "discharge of a pollutant" to exclude a "water transfer," which is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening" use. 40 C.F.R. § 122.3(i). Stormwater discharges from an MS4 outfall are not "water transfers" excluded from regulation; they are explicitly subject to the NPDES permit program. 33 U.S.C. § 1342(p); 73 Fed. Reg. 33,697, 33,705 (June 13, 2008).

3. Monitoring And Reporting To Assess Permit Compliance

To obtain an MS4 permit, a municipality must submit an application that establishes its ability to

"[c]arry out all . . . monitoring procedures necessary to determine compliance and noncompliance with permit conditions." 40 C.F.R. § 122.26(d)(2)(i)(F). The applicant must include a proposed monitoring program "for representative data collection" that describes the sampling location and explains "why the location is representative." *Id.* § 122.26(d)(2)(iii)(D). This representative sampling may be conducted at "instream stations" instead of at MS4 outfalls. *Id.*

Every NPDES permit must require the discharger to conduct monitoring sufficient to assure compliance with its permit limits. *Id.* § 122.44(i)(1) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"); *see also* 33 U.S.C. § 1342(a)(2) ("The Administrator shall prescribe conditions for such permits to assure compliance with the requirements" of the statute). This monitoring must be "representative" of the discharges being regulated: "All permits shall specify . . . [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b). "Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." *Id.* § 122.41(j)(1).

In addition to monitoring requirements, the statute and EPA regulations also impose comprehensive reporting obligations on all permit holders. Dischargers must file reports with the permitting authority disclosing the results of any monitoring. *Id.* §§ 122.41(*l*)(4), 122.48(c). These self-monitoring reports

must be publicly available. 33 U.S.C. § 1318(b). Every discharger is required to certify its results under threat of criminal sanction for submitting false or incomplete information. *Id.* § 1319(c)(4). Dischargers must report at least annually all instances of non-compliance with permit limits. 40 C.F.R. § 122.44(i)(5).

The statute's mandated self-monitoring and reporting facilitates permit enforcement. EPA concluded that "Congress intended that prosecution for permit violations be swift and simple." 44 Fed. Reg. 32,854, 32,863 (June 7, 1979). The self-monitoring and reporting provisions were designed "to avoid the necessity of lengthy fact finding [and] investigations . . . at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730; *see also* H.R. Rep. No. 92-911, at 113-14 (1972) ("This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.").

4. State Court Review Of State-Issued NPDES Permits

Congress empowered state agencies to implement the NPDES permitting program, and EPA has delegated

that authority to the State of California. 33 U.S.C. § 1342(b); 54 Fed. Reg. 40,664, 40,664 (Oct. 3, 1989). For Los Angeles County, California law further assigns that responsibility to the Regional Water Quality Control Board for the Los Angeles Region (Regional Board). Cal. Water Code §§ 13200(d), 13225, 13263.

Every state-issued NPDES permit must contain limits that are at least as stringent as those required by federal law. 33 U.S.C. §§ 1311(b)(1)(C), 1342(b); 40 C.F.R. §§ 123.1(i)(1), 123.25(a). All state permits must also include the monitoring and reporting requirements described above. 33 U.S.C. § 1342(b)(2)(B); 40 C.F.R. § 123.25(a).

State-issued permits can be challenged in state court upon their adoption. 40 C.F.R. § 123.30. Under California law, any permit challenge must be brought within thirty days through an administrative appeal to the State Water Board, with subsequent judicial review in state court. Cal. Water Code §§ 13320, 13330.

The Clean Water Act bars any collateral attack on permit terms; the validity of an NPDES permit cannot be challenged during an enforcement proceeding. 33 U.S.C. § 1369(b)(2) (prohibiting "judicial review in any civil or criminal proceeding for enforcement" of "[a]ction[s] of the Administrator with respect to which review could have been obtained under" section 1369(b)(1), which includes "issuing or denying any [NPDES] permit"). This prohibition extends to permits

issued by states. *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1381-83 (D.C. Cir. 1999).

5. Incorporation Of State Water Quality Standards Into NPDES Permits

The Clean Water Act requires each state to adopt and submit for federal approval water quality standards for all waters within its boundaries. 33 U.S.C. § 1313(a)(3)(A), (c). State water quality standards consist of designated uses for particular water bodies and corresponding maximum pollutant levels set to achieve and protect those uses. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 130.2(d). These standards are intended to protect public health and enhance water quality. 33 U.S.C. § 1313(c)(2)(A). Water quality standards establish the desired condition of a water body and create a uniform basis for regulating all point sources discharging to that water body. *See PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). NPDES permits are the "primary means" for enforcing water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (citation omitted).

The Regional Board adopted water quality standards for southern California through what is referred to as the Basin Plan.[5] *See* Cal. Water Code

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[5] Cal. Reg'l Water Quality Control Bd., *Los Angeles Region Water Quality Control Plan* 2-1 to 3-23 (1995), *available at*

(Continued on following page)

§§ 13240, 13241. In response to a challenge filed by municipal stormwater dischargers, the California Court of Appeal upheld the Basin Plan and affirmed that the water quality standards it prescribes can be used to regulate stormwater discharges from MS4s. *City of Arcadia v. State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 249-52 (Cal. Ct. App. 2010).

EPA separately published the California Toxics Rule, which establishes additional water quality standards for toxic pollutants in inland waters in California.[6] 40 C.F.R. § 131.38. The Basin Plan and the California Toxics Rule together establish the governing water quality standards for pollutants in Los Angeles County's rivers, including the Los Angeles and San Gabriel Rivers.

D. The District's MS4 Permit

1. Permit Terms And History

The Regional Board issued the District's current NPDES permit in 2001. JA 52-254. The permit regulates the interconnected MS4 owned by the District,

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http://water.epa.gov/scitech/swguidance/standards/upload/2001_04_05_standards_wqslibrary_ca_ca_9_los_angeles.pdf.

[6] "Toxic pollutants" are defined as those pollutants known to cause "death, disease, behavioral abnormalities, cancer, genetic mutations, . . . or physical deformations" in living organisms. 33 U.S.C. § 1362(13). A number of pollutants at issue in this case are toxic, including copper, cyanide, lead, mercury, and zinc. 65 Fed. Reg. 31,682, 31,712 (May 18, 2000).

Los Angeles County, and 84 cities within the County. JA 55-56.

The permit first sets forth the Regional Board's findings of fact, including that the District and its co-permittees discharge stormwater from the MS4 into waters of the United States. JA 55-56. Each permit holder is responsible for the discharges from the parts of the MS4 "for which it is the operator." JA 93; 40 C.F.R. § 122.26(b)(1).

The permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards." JA 97. These standards limit the MS4's discharges of fecal bacteria, arsenic, cyanide, mercury, copper, zinc, and other pollutants. Pet. App. 14, 19; JA 370. Attainment of water quality standards must be satisfied "through timely implementation of control measures and other actions to reduce pollutants" in discharges. JA 98. To limit the introduction of pollutants into the MS4, the permit also requires each permittee to "hold dischargers to its MS4 accountable for their contributions of pollutants and flows." JA 109.

As it must under the Clean Water Act and federal regulations, the permit mandates that the permittees "shall" have adequate legal authority to carry out all "monitoring procedures necessary to determine compliance and non-compliance with permit conditions." JA 109. The permit's monitoring program was designed and proposed by the District and its co-permittees and approved by the Regional Board.

JA 65, 418, 454. Under this program, sampling is conducted at designated "mass emission stations" located in major rivers, including in the Los Angeles River and San Gabriel River. Pet. App. 17-18; JA 219. The District must collect samples at least five times per year at each mass emission monitoring location. JA 219. The permit does not require monitoring of any of the MS4's thousands of individual outfalls. JA 218-221, 454.

The mass emission stations are small structures, similar in size to a garden shed, located along the banks of each river. At each location, a narrow-diameter pipe runs from the mass emission station into the river to collect the required water samples. The permit includes detailed specifications for how the mass emission sampling must be conducted and how the results must be analyzed. JA 219-221.

The stated purpose of the permit's monitoring program is to assess compliance with the permit, characterize stormwater discharges, and identify pollutant sources. JA 218. The mass emission monitoring in particular accomplishes the following objectives: "[e]stimate the mass emissions from the MS4; [a]ssess trends in the mass emissions over time; and [d]etermine if the MS4 is contributing to exceedances of Water Quality Standards by comparing results to applicable standards . . . and with emissions from other dischargers." JA 219.

The permit requires the permittees to implement a remedial program if the monitoring results show that discharges violate water quality standards. JA

98-99. Specifically, when violations are detected at the mass emission stations, the permittees "shall assure compliance" with water quality standards by preparing a compliance report that identifies the violations and adopts more stringent pollution control measures to eliminate them. JA 98. This compliance report "shall include" (1) a plan to comply with water quality standards, (2) revised pollution control measures to eliminate exceedances, (3) "[e]nhanced monitoring to demonstrate compliance," and (4) the results of implementation of these measures. JA 213. Each permittee must apply these steps to "discharges within its boundaries." JA 104.

The permit designates the District as the "Principal Permittee," which imposes on the District enhanced responsibilities. JA 103. As Principal Permittee, the District must "facilitate activities necessary to comply" with the permit by all other co-permittees and implement the self-monitoring program the permit requires. JA 103. The District must also submit an annual stormwater monitoring report to the Regional Board to identify and summarize all monitoring data collected under the permit. JA 214-216. This report must list all sampling results and highlight those that exceed water quality standards. JA 215.

2. The District's Unsuccessful State Court Challenge To The Permit

After the permit was adopted in 2001, the District unsuccessfully challenged it in state court. The

District argued in part that the permit should be read to include a "safe harbor" that would relieve it of responsibility for violating water quality standards. JA 259-264 (*In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548 (L.A. Super. Ct. Mar. 24, 2005)); Pet. App. 115 n.8. The state trial and appeals courts rejected this argument and affirmed the permit. JA 264; *Cnty. of L.A. v. Cal. State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 622 (Cal. Ct. App. 2006).

In the same lawsuit, other co-permittees (not including the District) challenged the monitoring program set forth in the permit. The court found that the permittees were estopped from challenging the permit's monitoring program because "the challenged requirements are substantially similar to what the permittees proposed in their application for the Permit," and therefore "the doctrines of estoppel and waiver apply." JA 418 (*In re L.A. Cnty. Mun. Storm Water Permit Litig.*, No. BS 080548, at 19 (L.A. Super. Ct. Mar. 24, 2005)). The court also noted that federal regulations require permittees to "[c]arry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with Permit conditions." JA 418-419. The court upheld the permit's monitoring and reporting program because "federal authority mandates" that such a program be used to determine compliance. JA 419.

In a separate lawsuit filed after the permit was upheld, the District's co-permittees, supported by the District as *amicus*, challenged the state water quality standards with which the permit requires compliance

and argued that those standards could not be used to set limits for stormwater discharges from an MS4. *City of Arcadia*, 119 Cal. Rptr. 3d at 249-52. The state court of appeals rejected that argument and affirmed both the state water quality standards and their applicability to stormwater discharges. *Id.*

3. Pending Permit Renewal Proceedings

The District's permit is currently being rewritten. The Regional Board proposed a new permit in June 2012, which contains a revised monitoring program to determine compliance with permit limits. The Regional Board conducted hearings on the proposed permit on October 4 and 5, and has scheduled a vote on permit adoption for November 8.[7]

The new permit would require the permittees for the first time to conduct end-of-pipe outfall monitoring, in addition to the current instream monitoring, to "[d]etermine whether a Permittee's discharge contributes to or causes an exceedance of receiving water limitations." Cal. Reg'l Water Quality Control Bd., L.A. Region, Revised Tentative Order No.

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[7] *See* L.A. Reg'l Water Quality Control Bd., *Notice of Opportunity for Public Comment and Notice of Adoption Meeting* 1-2 (Oct. 18, 2012) ("The Board is expected to take action on the Revised Draft Tentative Order on November 8, 2012."), *available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Updated/Notice%20for%20LA%20MS4%2011-8-2012.pdf.pdf.

R4-2012-XXXX, NPDES Permit No. CAS004001, Att. E, E-4.[8] The outfalls to be monitored are selected by the District and each of the other permittees. *Id.* at E-22 – E-23. The tentative new permit also gives permittees the choice of conducting individualized monitoring or monitoring together in a coordinated program. *Id.* at E-3 – E-4, E-7 – E-8. The new monitoring program, when adopted, will supersede the current permit's compliance monitoring and apply to all future MS4 discharges and any enforcement actions.[9]

II. Proceedings Below

Respondents the Natural Resources Defense Council and Santa Monica Baykeeper filed this lawsuit to eliminate ongoing permit violations. The complaint alleged that the District's and Los Angeles

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[8] *Available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Updated/Attachment%20E%20-%20MRP.pdf.

[9] Because the District's impending new permit and amended compliance monitoring will govern any future enforcement action, a decision on the merits here will apply to this case only. It would therefore be appropriate for the Court to dismiss the writ of certiorari as improvidently granted. *Quinn v. Muscare*, 425 U.S. 560, 563 (1976) (dismissing writ because challenged regulations were amended after certiorari was granted); *Taggart v. Weinacker's, Inc.*, 397 U.S. 223, 224-25 (1970) (dismissing writ because changed circumstances minimized the continuing relevance of the controversy); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76-77 (1955) (dismissing writ because an intervening change in state law gave the case "isolated significance").

County's polluted MS4 discharges contributed to violations of water quality standards in four rivers: the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek. Pet. App. 22. The district court bifurcated the liability and remedy phases of the case, Dist. Ct. Dkt. No. 78, and the parties filed cross-motions for summary judgment on liability.

The District did not dispute that its monitoring reports show that MS4 discharges repeatedly violated water quality standards in the four rivers. Pet. App. 108, 117. However, the District argued that its self-monitoring results do not establish liability for permit violations, because the monitoring is not conducted at the precise point of discharge from one of its thousands of MS4 outfalls into a river. Pet. App. 115. Instead, the sampling is conducted in the rivers themselves, as the District requested, at instream locations downstream of the District's and its co-permittees' MS4 discharges.

The district court agreed with petitioner that instream monitoring was insufficient to establish liability, and ordered respondents to submit additional water sampling data showing discharges of a "standards-exceeding pollutant" from the District's "outflows" at or near the time of the documented violations. Pet. App. 122-123. The court subsequently held the supplemental evidence filed by respondents did not support liability because there was no clear indication that it was collected at or near a District "outflow." Pet. App. 100-101. The court granted summary

judgment for the District and entered final judgment on these claims.[10]

The court of appeals reversed in relevant part. The court first held that "the Permit's provisions plainly specify that the mass-emissions monitoring is intended to measure compliance," and "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." Pet. App. 40. However, the court of appeals rejected respondents' argument that this compliance monitoring established the District's liability for permit violations as a matter of law. Pet. App. 41-42. Instead, the court agreed with the District that, in order to demonstrate a permit violation, respondents were required to submit additional proof of the District's contribution to the permit violations, beyond the results of the permit's compliance monitoring. Pet. App. 44, 48-49.

Next, relying on an argument not advanced by respondents, the court of appeals found the District liable for violations in the Los Angeles and San Gabriel Rivers because the monitoring stations for each river are "located in a section of the MS4 owned and operated by the District." Pet. App. 44. Therefore, the court determined that violations were detected in

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[10] Respondents prevailed on a separate claim regarding the District's discharge of waste from its MS4 into a protected coastal area. Pet. App. 125-128. That claim remains pending in district court; further proceedings to determine the appropriate remedy have been stayed.

water sampled *prior* to discharge from the District's MS4 into the rivers. The court concluded that "[t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." Pet. App. 45.

The District petitioned for rehearing and argued in part that the permit includes a "safe harbor" provision that shields the District from liability for good faith violations. The appeals court issued an amended opinion expressly rejecting the District's "safe harbor" argument, holding that "no such 'safe harbor' is present in this Permit," and noting that the California state courts and the district court below had all reached that same result. Pet. App. 37-38 & n.7.[11]

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[11] In opposing the petition for certiorari, both respondents and the United States argued that the court of appeals did not base its decision on either of the plainly incorrect legal conclusions now attributed to the court by petitioner. Resp. Supp. Br. in Opp. 1-3; U.S. Cert. Br. 11-12, 16-20. There is no basis to conclude that the court held, *sub silentio*, that the mere transfer of pollutants within a single water body constitutes a point source discharge under the Clean Water Act, contrary to *Miccosukee*, 541 U.S. at 109, or that the portions of the Los Angeles and San Gabriel Rivers lined with concrete are outside the jurisdiction of the Act, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006).

SUMMARY OF ARGUMENT

1. The question presented by petitioner is whether a "discharge of pollutants" under the Clean Water Act occurs when water flows from one portion of a river through an engineered improvement within the river to a lower portion of the same river. The answer to that question is no. *Miccosukee* makes clear that transferring water between two parts of the same water body, without more, does not constitute a discharge of pollutants, and therefore no NPDES permit is required for that activity. 541 U.S. at 109, 112.

However, the answer to the question presented is not relevant to petitioner's liability, because petitioner does not simply transfer water between two parts of the same water body. Petitioner mischaracterizes the basic function and purpose of its MS4 by repeatedly suggesting that it "merely transfers" water within a single river. That suggestion is false. As petitioner elsewhere admits, it discharges stormwater from MS4 outfalls into navigable waters and is properly subject to an NPDES permit. Pet. Br. 44. The entire premise of petitioner's brief – that it is excused from liability under *Miccosukee* because it is "merely transferring" pollutants *within* navigable waters – is therefore invalid.

2. The judgment of the court of appeals should be affirmed because the results of the representative compliance monitoring required by the permit establish petitioner's violations of its discharge limits as a

matter of law. The Clean Water Act, EPA regulations, and petitioner's permit all compel this result.

a. Under the Clean Water Act, all NPDES permits must impose self-monitoring and reporting requirements sufficient to determine compliance with permit limits. EPA regulations provide that such monitoring can be conducted at a representative location, including an instream location that is not at the point of discharge. The permit at issue here conforms to these federal requirements: it mandates instream, representative monitoring to measure compliance with the permit's pollution discharge limits. JA 219.

The District's undisputed monitoring results reveal frequent violations of water quality standards for fecal bacteria, toxic metals, and other pollutants in the Los Angeles and San Gabriel Rivers, at levels that are orders of magnitude above the governing limits set by the state and incorporated into the District's permit. These discharges cause serious and documented harm to public health, the environment, and the regional economy. And they have continued, unabated, for years, because the District has refused to acknowledge that the permit's compliance monitoring results trigger its obligation to reduce the pollutants in its discharges.

b. In the District's view, the monitoring required by the permit could never establish its liability for discharge violations. As it openly admitted below, this would be true even if its discharges "were so

polluted with oil and grease that they were on fire as they came out of the system." JA 303; Pet. App. 43 n.8. The District's position defies the express language of the permit, which provides that petitioner "*shall*" have sufficient authority to carry out "*all*" monitoring necessary to demonstrate compliance or non-compliance with permit conditions. JA 109. Indeed, the District itself requested the monitoring regime set forth in its permit. Having taken advantage of the less burdensome nature of that monitoring, the District cannot now fairly claim that its monitoring scheme is inadequate.

c. The District's argument that it cannot be held accountable based on the self-reported results of its compliance monitoring is an improper collateral attack on the permit. 33 U.S.C. § 1369(b)(2). All technical questions regarding the sufficiency of any permit's compliance monitoring must be resolved during the permitting process by the expert state agency charged with writing and administering the permit. In California, any remaining dispute can be heard only in state court, after an administrative appeal. Cal. Water Code §§ 13320, 13330. Through five years of state court litigation, the District unsuccessfully challenged its permit. After this full and fair opportunity for review of the permit's terms, the District is barred from making a collateral attack on its permit in an enforcement proceeding.

d. The District's refusal to acknowledge the legal relevance of its compliance monitoring severely undermines NPDES permit enforcement. Compliance

monitoring is central to Clean Water Act implementation and is intended to make permit enforcement simple and straightforward. In contrast, the District would require citizen plaintiffs or any other enforcement authority to conduct additional, independent monitoring from the District's storm sewer outfalls to establish liability. Even assuming plaintiffs could lawfully (and safely) access the District's MS4 outfalls, such monitoring is well beyond what the permit requires and would introduce complicated fact disputes for courts to resolve in every enforcement case. Petitioner's position upends the simple and straightforward permit enforcement intended by Congress and mandated by EPA regulations.

3. a. It is both appropriate and fair to hold the District to the strict terms of its permit, including the requirement that the permit's monitoring establishes the District's liability for permit violations. The District is correct that the mass emission monitoring measures the District's and its co-permittees' commingled stormwater discharges into each river. However, holding the District liable on the basis of that monitoring does not make it responsible for other parties' discharges. Under the express terms of the permit, the District must identify and remediate *only its share* of the commingled pollutant discharge; it is not required to clean up or eliminate any other party's discharge. JA 98-99, 104, 213. The permit's built-in remedial program requires gradual and targeted pollution control measures that each permittee must apply only to "discharges within its boundaries."

JA 104. And because the District owns and operates the vast majority of the MS4 – more than all other permittees combined – reducing the District's share of stormwater pollution will go a long way toward eliminating the problem entirely.

b. The District complains that if it is held liable for permit violations the required remedy will be burdensome and inconvenient. Any such burden was imposed by Congress when it amended the Clean Water Act to require effective regulation of stormwater discharges from MS4s, after fifteen years of failed attempts by EPA. Moreover, there are dozens of feasible remedial measures – far short of the dramatic burdens the District posits – that will minimize stormwater pollution and simultaneously lessen flood risk. In any event, the District's argument regarding potential burdens is premature because there have not yet been any remedy proceedings in this case. The district court will have equitable discretion to tailor injunctive relief to the circumstances here, taking into account the District's concerns about cost and feasibility.

The Court should therefore affirm the judgment below because the results of the District's compliance monitoring establish its liability for permit violations as a matter of law.

ARGUMENT

I. This Case Does Not Implicate *Miccosukee*

The question presented by petitioner is whether transferring water within a single river constitutes a discharge of pollutants under the Clean Water Act. The answer is no. *Miccosukee* establishes that there is no "discharge of pollutants" under the Act when water flows from one portion of a river through an engineered improvement in the river to a lower portion of the same river. 541 U.S. at 109.[12]

Petitioner asserts that the court of appeals found a discharge from the MS4 based solely on water flowing within the confines of the Los Angeles and San Gabriel Rivers. The court's opinion does not support that reading. Both respondents and the United States agree that the court of appeals did not misapply *Miccosukee*, Resp. Br. in Opp. 14-20, and that the court instead likely misunderstood the relative locations of the mass emission monitoring stations and the upstream MS4 outfalls. Resp. Supp. Br. in Opp. 3; U.S. Merits Br. 21-23. The court of

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[12] In their briefs opposing certiorari, both respondents and the United States confirmed that all parties agree on this point. *See* Resp. Br. in Opp. 14 ("The [*Miccosukee*] Court held that transferring pollutants within a single water body would not require a permit."); Resp. Supp. Br. in Opp. 1 ("Should the Court grant the petition for certiorari, respondents would not argue that either of these illusory rulings is correct."); U.S. Cert. Br. 20 n.7 ("Respondents have not argued . . . that a transfer of polluted water between two parts of the same water body is a 'discharge' of pollutants within the meaning of the Act.").

appeals' statements suggest it believed the monitoring stations sampled polluted stormwater from the District's MS4 before, not after, discharge to the Los Angeles and San Gabriel Rivers. *E.g.*, Pet. App. 44 ("[W]hen pollutants were detected, they had not yet exited the point source into navigable waters.").

Petitioner's brief repeatedly conveys the misimpression that its MS4 only moves water within the Los Angeles and San Gabriel Rivers, thereby precluding liability under *Miccosukee*. Pet. Br. 23 (it "merely transfers water from one part of a river to another"); *see also id.* 22 ("mere flow of water"), 24 ("mere passage of water"), 29 ("mere flow of water"), 31 ("[m]erely transferring water"), 32 ("mere transfer of water"), 34 ("mere transfer, or flow"), 40 ("mere transfer of water," "mere flow of water"), 44 ("simply transferring water"), 45 ("water simply flowing"), 46 ("simply moving water"), 50 ("mere flow of water," "mere transfer of water"). That refrain is untrue. As petitioner elsewhere concedes, *id.* 44, the District discharges pollutants from thousands of external point sources – its MS4 outfalls – *into* the Los Angeles and San Gabriel Rivers. *See* U.S. Merits Br. 25 ("Petitioner is unquestionably responsible for numerous pollutant discharges at the many outfalls under its control where stormwater is discharged into those rivers."). Indeed, the permit's first finding of fact is that the District "discharges"

stormwater from its MS4 into navigable waters. JA 55-56.[13]

Miccosukee therefore is not implicated by the underlying facts, because there is no dispute that the District discharges pollutants from MS4 outfalls into navigable waters and is currently subject to a valid NPDES permit. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 381 (2006) (holding that *Miccosukee* was "concerned only with whether an 'addition' had been made," which would trigger the requirement for an NPDES permit). *Miccosukee* does not limit or address the Clean Water Act's regulation of discharges from MS4s.

Accordingly, this Court does not have to resolve the question whether the lower court's ruling is premised on an erroneous legal theory, as petitioner argues, or an error of fact, as respondents and the United States believe. As detailed below, the Court should affirm the lower court's judgment in either circumstance because the undisputed results of the District's compliance monitoring establish its liability for permit violations as a matter of law.

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[13] Petitioner's own *amici* acknowledge that petitioner's brief is misleading on this point: "The District asserts that it is merely transferring water within single bodies of water, i.e., the Los Angeles River and San Gabriel River. . . . The Court should not be misled by this mischaracterization of the District's MS4 storm water discharges." Br. of Western Urban Water Coalition, et al. 9.

II. The Compliance Monitoring Required By The District's Permit Establishes Its Permit Violations

The Clean Water Act prohibits (a) the discharge (b) of a pollutant (c) from a point source (d) to navigable waters (e) in excess of permit limits. 33 U.S.C. §§ 1311(a), 1362(12). The first four elements are not in dispute here. The District concedes that it discharges stormwater runoff from point sources into navigable waters, and that it is properly subject to an NPDES permit. The only remaining question, then, is how to measure the District's compliance with its permit limits. The permit's monitoring program answers that question.

The Clean Water Act requires every NPDES permit to impose self-monitoring and reporting procedures sufficient to determine compliance with the permit's terms. This is central to effective implementation and enforcement of the Act. Compliance monitoring must be conducted at representative locations, which may include particular discharge points *or* instream locations (or both). The District itself proposed the instream compliance monitoring in its permit, and the results of that monitoring show chronic and uncontested violations of permit limits for a range of pollutants, including fecal bacteria and toxic metals. The permit was challenged and upheld in state court, and the District is barred from making a collateral attack on its permit now, in an enforcement proceeding.

In finding the District liable, the court of appeals did not accept respondents' argument that the permit's compliance monitoring established the District's liability as a matter of law. Pet. App. 41. This argument, however, was raised and ruled on below and preserved in respondents' opposition to certiorari. Pet. App. 41, 121; Resp. Br. in Opp. 18-19; Resp. Supp. Br. in Opp. 4-5.[14]

A. All NPDES Permits Must Include Monitoring Sufficient To Determine Compliance

The Clean Water Act requires every NPDES permit to include monitoring sufficient to assure permit compliance. 33 U.S.C. §§ 1318(a)(A), 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"), 122.44(i)(5) (dischargers must report all instances of non-compliance with permit limits at least annually). The results must be reported in

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[14] Because this alternative ground would sustain and not change the judgment, it need not have been presented by respondents in a cross petition. *See Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 364 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment."); *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.").

public documents filed with the state or EPA under penalty of perjury. 40 C.F.R. § 122.41(k).

Every discharger must propose in its permit application monitoring sufficient to demonstrate the permittee's compliance with permit limits. As a condition of receiving an MS4 permit, a municipality must submit an application containing a proposed monitoring program "for representative data collection" that identifies a sampling location and explains "why the location is representative." *Id.* § 122.26(d)(2)(iii)(D). This sampling may be conducted at "instream stations" instead of particular MS4 outfalls. *Id.* (the application must describe "the location of outfalls *or* field screening points to be sampled (*or* the location of instream stations)" (emphasis added)). In other words, the compliance monitoring may be conducted at a "representative" location that is not at the precise point of discharge. The monitoring results are used "to determine compliance and noncompliance with permit conditions." *Id.* § 122.26(d)(2)(i)(F).

Most large MS4s contain too many outfalls to monitor individually; dischargers often do not even know how many outfalls they have. 55 Fed. Reg. at 48,046. Federal regulations thus provide EPA, delegated states, and dischargers with flexibility to design a range of possible monitoring programs to assess compliance with permit limits. EPA guidance explains that "[a]ny comprehensive monitoring program should have clear monitoring objectives to help determine compliance and water quality impacts. Each monitoring program is unique and should be

customized to the specific waterbodies, impairments, and pollutant sources of the MS4." EPA, *MS4 Permit Improvement Guide* 95 (April 2010).[15]

The District incorrectly states that compliance with permit limits can be measured only at an "outfall." Pet. Br. 43 (arguing that "[t]he foundation of permit compliance is measurement at an 'outfall'"); Pet. Br. 15 n.4 (claiming that "'outfall' . . . is the regulatory term for the point at which compliance with an MS4 permit's terms is measured with respect to discharges into navigable waters"). To support this argument, the District relies on 40 C.F.R. sections 122.26(b)(9) and 122.45(a), but neither regulation addresses compliance monitoring at all. Instead, section 122.26(b)(9) defines the term outfall to mean "the point where a municipal separate storm sewer discharges to waters of the United States," and section 122.45(a) states that effluent limitations in a permit "shall be established for each outfall," where feasible.

The District ignores every regulation that does address compliance monitoring. Those regulations provide that monitoring may be conducted at "instream stations" and "shall be" representative of a permittee's discharge. 40 C.F.R. §§ 122.26(d)(2)(iii)(D), 122.26(d)(2)(i)(F), 122.41(j)(1), 122.44(i)(1), 122.48(b). EPA explains that "[t]he NPDES regulations do not

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[15] *Available at* http://www.epa.gov/npdes/pubs/ms4permit_improvement_guide.pdf.

prescribe exact monitoring locations; rather, the permit writer is responsible for determining the most appropriate monitoring location(s) and indicating the location(s) in the permit." EPA, *NPDES Permit Writers' Manual* 8-2 (Sept. 2010);[16] *see also* U.S. Merits Br. 9 ("[S]ubject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two."). Compliance monitoring need not be conducted solely at a discharge point. *See, e.g.*, *Texas Mun. Power Agency v. Adm'r of the U.S. EPA*, 836 F.2d 1482, 1489 (5th Cir. 1988) (affirming EPA's issuance of an NPDES permit that did not require outfall monitoring to measure compliance, noting that "end-of-pipe" monitoring "is sometimes impractical"). The District is plainly wrong that permit compliance can be measured only at an outfall.

B. Self-Reported Compliance Monitoring Results Establish Permit Violations And Enable Enforcement

The results of each permit's compliance monitoring provide the basis for government and citizen enforcement. A permit violation is established by comparing the discharge prohibitions in the permit to the self-monitoring data of the discharger. "In short,

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[16] *Available at* http://www.epa.gov/npdes/pubs/pwm_chapt_08.pdf.

the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations" under the Clean Water Act. *EPA v. California*, 426 U.S. at 205. According to EPA, "Congress intended that prosecution for permit violations be swift and simple." 44 Fed. Reg. at 32,863.[17]

Technical questions regarding the adequacy of monitoring are settled during the permitting process. Once those questions have been resolved, enforcement is a straightforward matter of comparing a discharger's reported monitoring results against the limits in its permit. This relieves courts of the obligation to adjudicate highly technical disputes in enforcement proceedings. It also provides certainty to dischargers, regulators, and citizens. Lower courts have consistently reinforced these points. *See, e.g.*, *Inland Empire Waterkeeper v. Uniweb, Inc.*, No. 07-CV-480 (DDP), 2008 WL 6098645, at *9 (C.D. Cal. Aug. 6, 2008) ("A monitoring report that shows a water sample with pollutant discharges in excess of permit limits is conclusive evidence of a violation."); *Save Our Bays & Beaches v. City & Cnty. of Honolulu*, 904 F. Supp. 1098, 1105 (D. Haw. 1994) ("A critical part of the regulatory scheme is a strict self-reporting

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[17] *See also* EPA, *NPDES Permit Writers' Manual* 8-1 (Sept. 2010) ("Periodic monitoring and reporting establish an ongoing record of the permittee's compliance status and, where violations are detected, create a basis for any necessary enforcement actions."), *available at* http://www.epa.gov/npdes/pubs/pwm_chapt_08.pdf.

system requiring permittees to monitor carefully their permit compliance and to report their own permit violations . . . ."); *Student Pub. Interest Research Grp. of N.J. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1531 (D.N.J. 1984) ("[A] discharger must report its own permit violations should they occur.").

The congressional purpose behind this self-monitoring mechanism is to eliminate complicated factual disputes during enforcement proceedings, after violations have been reported. According to the Senate Report, "[o]ne purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730. "[T]he threat of sanction must be real, and enforcement provisions must be swift and direct." *Id.* at 65, *reprinted in* 1972 U.S.C.C.A.N. at 3731.

Because all dischargers must conduct their own compliance monitoring and report the results publicly, "the factual basis for enforcement of requirements would be available at the time enforcement is sought." *Id.* at 80, *reprinted in* 1972 U.S.C.C.A.N at 3746. This relieves enforcement authorities of the burden of investigating compliance with every NPDES permit and generating third party monitoring data to discover and prove violations of permit

limits. H.R. Rep. No. 92-911, at 113-14 (1972) ("[O]ne of the critical deficiencies in existing law is the lack of an effective system for obtaining information on pollutants discharged to surface or ground waters. . . . This section requires the owner or operator of any point source to monitor his own discharges accurately and to provide information to show whether or not he is in compliance with effluent limitations and other requirements under this Act.").

Congress could have exempted municipal stormwater discharges from the Clean Water Act entirely, as it has for other sources of water pollution. *See, e.g.*, 33 U.S.C. § 1342(*l*)(1) (exempting "discharges composed entirely of return flows from irrigated agriculture"). Instead, Congress amended the Act explicitly to require regulation of stormwater discharges from MS4s. It did so to address a serious pollution problem. *See, e.g., Natural Res. Def. Council v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992) ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987[.]" (citations omitted)); *Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 141 (Cal. Ct. App. 2004) ("In the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health." (citations omitted)).

The Act thus requires regulation of large MS4s like the District's through the NPDES program, which includes at its heart self-monitoring and self-reporting of violations and straightforward enforcement. The statute's monitoring and reporting scheme advances the core objective of the Act: to protect and restore the quality of the Nation's waters. 33 U.S.C. § 1251(a).

C. The Monitoring Required Under The Permit Shows Undisputed Violations Of Permit Limits

Petitioner's NPDES permit prohibits discharges from the MS4 that cause or contribute to exceedances of water quality standards. JA 97. It further includes a self-monitoring and reporting program, as required by law. The permit states that the permittees "shall" have adequate legal authority to "[c]arry out *all* inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions." JA 109 (emphasis added). And the permit directs that compliance with water quality standards be measured through mass emission monitoring conducted at designated locations in the Los Angeles River and San Gabriel River, among other major rivers. JA 219 (stating that the District "shall monitor mass emissions" to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards"). The "primary objectives" of this monitoring program include "[a]ssessing compliance with this [permit]." JA 218. This monitoring regime was

proposed and designed by the District and adopted by the Regional Board. JA 65, 418, 454.

The mass emission monitoring results for the Los Angeles River and San Gabriel River show more than 140 violations of water quality standards for ten different pollutants in those rivers during the time period covered by the complaint. C.A. ER 355-364 (table of reported monitoring results). These violations are undisputed and include measurements of aluminum twenty times the legal limit, cyanide fifty times the limit, and fecal coliform 60,000 times the limit. Pet. App. 108, 117; C.A. ER 358-363.

The permit's monitoring program does not require sampling of discharges from individual outfalls. JA 454. Instead, the permit evaluates the District's MS4 discharges from samples collected at instream stations, which is consistent with EPA's regulation allowing representative, instream sampling. 40 C.F.R. § 122.26(d)(2)(iii)(D). There are thousands of outfalls from the District's MS4 – "an enormous number that cannot all be sampled cost-effectively" – and the District has never provided a map showing their full extent. C.A. ER 155-156; Pet. App. 8. Requiring some type of representative sampling is the only workable monitoring regime.

Thus, the mass emission stations, even though not located directly at the District's discharge points, measure water samples that are "representative" of the District's discharges as a matter of law. 40 C.F.R. § 122.26(d)(2)(iii)(D). The results of that monitoring

prove the District's violations of its permit, which prohibits discharges that contribute to violations of water quality standards.[18]

D. The District Is Barred From Making A Collateral Attack On The Terms Of Its NPDES Permit

The District opposes use of the permit's compliance monitoring for its stated purpose: to determine compliance with permit terms. This is an improper collateral attack on the permit that the Court lacks jurisdiction to hear.

As the Regional Board explained, "the Permit incorporates the type of monitoring scheme that the *permittees expressly requested* in their permit application. That scheme determines compliance not at any city's individual outfalls, but in-stream at 'mass emissions stations'. . . ." JA 454 (emphasis added, citation omitted). Having taken full advantage of the

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[18] Petitioner's *amicus* the National Association of Flood and Stormwater Management Agencies (NAFSMA) suggests, in a footnote, that mass emission monitoring results cannot be used to determine permit violations without comparing the results with emissions from other dischargers. Br. of NAFSMA 30 n.16. To the extent such a comparison is required, the governing permit language imposes that burden on the District. JA 219 (ordering that "the *Principal Permittee* shall monitor mass emissions to . . . [d]etermine if the MS4 is contributing to exceedances of Water Quality Standards *by comparing* results to applicable standards . . . and with emissions from other dischargers" (emphasis added)).

less burdensome scheme it requested, the District cannot now fairly argue that the permit's compliance monitoring does not determine its compliance with the law.

Indeed, section 509(b)(2) of the Clean Water Act bars the District from raising such a collateral attack on the adequacy of its permit, including its monitoring requirements, in a federal enforcement proceeding. 33 U.S.C. § 1369(b)(2). Under the Act, "any interested person" may seek judicial review "of various particular actions by the Administrator, including . . . issuance of permits for discharge of pollutants. Where review could have been obtained under this provision, the action at issue may not be challenged in any subsequent civil or criminal proceeding for enforcement." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13-14 (1981) (quoting 33 U.S.C. § 1369(b)). California provides the exclusive mechanism for administrative and judicial review of state-issued permits in state court. Cal. Water Code §§ 13320, 13330; *Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 91-92 (Cal. 2011). Once finalized, the permit is the law, and violation of a permit term is a violation of the law. 40 C.F.R. § 122.41(a).

The District and its co-permittees mounted three separate attacks on this permit in state court. First, the District unsuccessfully challenged the permit when it was adopted, arguing that it could not be held liable for violations of water quality standards measured at the mass emission stations. JA 255-279;

Cnty. of L.A., 50 Cal. Rptr. 3d at 622. Second, the District's co-permittees contested the permit's monitoring and reporting program, but the court held both that they were estopped from doing so – having designed the monitoring program themselves – and that federal regulations required a monitoring program adequate to "determine compliance and non-compliance with permit conditions." JA 418-419 (citations omitted). Third, the District's co-permittees, supported by the District as *amicus*, unsuccessfully challenged the state water quality standards with which the permit requires them to comply. *City of Arcadia*, 119 Cal. Rptr. 3d at 249-52. The permit's validity – including the sufficiency of the compliance monitoring program – is therefore settled.

Having lost its facial challenge to the permit, the District now attempts to achieve the same result by opposing the adequacy of the compliance monitoring the permit requires. The District's argument rests on the untenable premise that the permit's compliance monitoring cannot be used to assess any permittee's compliance or non-compliance with the permit's discharge prohibitions. But every permit *must* include monitoring sufficient to determine such compliance, and this permit does, as the state court recognized. JA 418-419. The District cannot now oppose the use of its self-reported compliance monitoring data to demonstrate permit violations. *See United States v. Gulf States Steel, Inc.*, 54 F. Supp. 2d 1233, 1241-43 (N.D. Ala. 1999) (refusing to consider defendant's argument that it could not be held liable for reported

NPDES permit violations because its permit's compliance monitoring measured internal waste streams prior to discharge, not discharges from outfalls directly into waters of the United States).

This rule cuts both ways; a plaintiff may not attempt to impose through an enforcement suit more stringent standards than a permit requires. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 326 (1981) (rejecting a claim that federal common law can impose more stringent limits on a discharger than those in its permit, and holding that "[t]he statutory scheme established by Congress provides a forum for the pursuit of such claims before expert agencies by means of the permit-granting process"). This promotes reliance and predictability. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (noting "the important goals of efficiency and predictability in the [NPDES] permit system"). Just as the violation of a permit is a violation of the law, compliance with the permit is deemed compliance with the law. 33 U.S.C. § 1342(k).

These twin principles benefit all parties. The permitting process is an open and often lengthy public proceeding before an expert agency. Complicated technical issues regarding appropriate permit terms are settled with the benefit of public hearings, workshops, inspections, expert testimony, and investigative reports. *See* JA 92-93 (describing the public process prior to issuance of the District's permit). The administrative record for the permit here, for example, is over 80,000 pages long, JA 259, and the permit

adoption hearing involved testimony from twenty-nine witnesses. The Regional Board held approximately fifty meetings with interested parties before issuing the permit. JA 259. At the conclusion of such a process, all parties – including the regulated community, enforcement authorities, and members of the public – are aware of exactly what the discharger's permit requires and how compliance will be assessed. To reopen permit terms upon enforcement unsettles parties' expectations, defeats finality, undermines the administrative process, and burdens the federal courts. More fundamentally, it allows persistent, dangerous pollution to go unchecked by complicating and prolonging enforcement proceedings. That is precisely what has happened here.

The District's collateral attack also raises a comity concern. Federal law allows EPA to delegate NPDES permitting authority to the states. California state courts affirmed both the permit and the relevant water quality standards against the permittees' challenges. The District is thus regulated by a state-issued permit that requires compliance with state-promulgated water quality standards, both of which were upheld by the state courts. To allow a collateral attack now in federal court would undermine the Clean Water Act's cooperative federalism scheme.[19]

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[19] The District's *amici* make an additional collateral attack and object to the permit's prohibition on discharges that contribute to violations of water quality standards. Br. of Nat'l Governors Ass'n 10; Br. of Western Coalition of Arid States 26;

(Continued on following page)

E. The District's Argument Would Severely Undermine Enforcement

Self-monitoring programs are central to effective permit enforcement, because they allow states, federal agencies, citizen plaintiffs, and the courts to compare a discharger's reported sampling results with the applicable permit limits and readily identify violations. *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* 1012 (6th ed. 2009) ("[E]nvironmental enforcement authorities rely heavily on self-monitoring and self-reporting requirements to detect violations."). The Regional Board stated that "[t]his system of self-reporting is critical to the NPDES program, which 'fundamentally relies' upon it. The data provided through accurate and

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Br. of League of Cal. Cities 7, 24 n.10. This permit provision has already been challenged and upheld and cannot be attacked again here. JA 260-262 (upholding the permit's requirement to comply with water quality standards); *see Bldg. Indus. Ass'n*, 22 Cal. Rptr. 3d at 137-38 (upholding an MS4 permit provision prohibiting dischargers from causing or contributing to violations of water quality standards). Moreover, petitioner's *amici* are wrong that an MS4 permit cannot require dischargers to do more than adopt "best management practices" to reduce pollution to the "maximum extent practicable." Br. of Nat'l Governors Ass'n 12. The Clean Water Act expressly states that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . *and* such other provisions as the Administrator or the State determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added); *see also Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) (holding that MS4 permits may "require strict compliance with state water-quality standards").

complete monitoring reports serve as conclusive evidence as to whether permit violations exist." JA 446 (citations omitted).

In district court, petitioner's designated representative testified at deposition that "[y]ou can never do enough monitoring" to assess any permittee's compliance with the permit at issue here. JA 406-407. Petitioner now appears to assert that its compliance with permit limits can be measured, but only on the basis of outfall monitoring. Pet. Br. 43 (claiming that "[t]he foundation of permit compliance is measurement at an 'outfall'"). Of course, at petitioner's own request, its permit does not require outfall monitoring.

Imposing independent compliance monitoring obligations on government enforcers and citizen plaintiffs, different from what the permit itself requires, would reverse the burden Congress placed on dischargers. It would also introduce complicated fact disputes into every permit enforcement lawsuit, effectively precluding enforcement. When the District or any other discharger conducts monitoring required by its permit, it must follow established sampling protocols and certify the results as accurate. 33 U.S.C. § 1319(c)(4); 40 C.F.R. § 136.1(a)(1)-(2). The results are admissions of liability. *WaterKeepers N. Cal. v. State Water Res. Control Bd.*, 126 Cal. Rptr. 2d 389, 392 (Cal. Ct. App. 2002) (monitoring reports filed pursuant to state NPDES permits "are admissible in court as admissions of the discharger and thus play a

critical evidentiary role in enforcement actions for violations of permit terms").

In contrast, if plaintiffs must collect additional sampling data to establish liability beyond what the permit's monitoring requires, these additional data would be subject to factual disputes requiring additional discovery and expert testimony. Every element of the sample collection and analysis process could be contested, from the technical adequacy of the sampling equipment to the validity of the scientific test methods and the accuracy of the results. This would significantly increase the time and expense required to enforce permit prohibitions. The increased burden would apply not just to citizen plaintiffs but to any state or federal enforcement authority.[20]

Requiring the development of elaborate additional facts to identify and demonstrate permit violations

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[20] It may also be impossible as a practical matter for respondents to obtain the data demanded by petitioner. Obtaining private water samples during a rainstorm in the rivers at issue here would be both dangerous, because of the speed and power of high-water flows in the rivers, and potentially illegal, given restrictions on public access to certain areas of the rivers. *See* Joe Linton, *Down by the Los Angeles River* 10 (2005) (describing serious safety risks of L.A. River access on rainy days); Blake Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* 224 (2001) ("Storm-fed runoff in the Los Angeles River reaches speeds as high as forty-five miles an hour."); Cal. Reg'l Water Quality Control Bd., *Los Angeles Region Water Quality Control Plan* 2-7 note m, 2-14 note m (1995) (public access prohibited in "concrete-channelized areas" of the rivers).

defeats the statutory purpose of streamlining permit enforcement on the basis of self-reported monitoring data. It also contravenes this permit's requirements that: (a) "[t]he *Permittees* shall possess adequate legal authority to . . . [c]arry out *all* inspection, surveillance and monitoring procedures necessary to determine compliance and non-compliance with permit conditions," JA 109 (emphasis added); (b) the District "shall monitor mass emissions" to "[d]etermine if the MS4 is contributing to exceedances of Water Quality Standards," JA 219; and (c) the District "shall" implement the monitoring required under the permit, JA 103. As the Regional Board correctly stated, to demand outfall monitoring data not generated by the permittees "undermines the enforceability of a system-wide-based Permit." JA 455. According to the Regional Board, "[s]uch a scheme would be inconsistent with the Clean Water Act's requirement for monitoring that is sufficient to determine compliance with water quality standards and its assumption that permittees will not hide from or turn a 'blind-eye' (whether willful or not) to violations." JA 448.

The District's proposed approach would impose a substantial burden on courts as well. The statute and regulations require NPDES permits to include clear limits and self-monitoring and reporting, which makes it easy to adjudge permit violations. The liability determination should be a simple matter of matching discharge reports with permit limits. The District's contrary position would require courts and juries to referee complicated technical disputes

regarding the adequacy of compliance monitoring, involving a mass of data and expert opinion in each enforcement case. This would improperly put district courts in the role of the state or federal permitting agencies and require the reconsideration of technical matters that were settled by the expert agency during the administrative process. *See City of Milwaukee*, 451 U.S. at 325 ("Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise," because of the technical complexity of water pollution control); *Conn. Fund for the Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1417 (D. Conn. 1987) ("Congress did not intend the courts to be the forums for determining the adequacy or inadequacy of scientific measurements" to establish permit violations). The result would be to undermine the straightforward enforcement that Congress sought to encourage.

Holding the District liable based on its compliance monitoring comports with the express purposes of the NPDES permit program: to define at the outset all of a discharger's obligations *and* the necessary means to monitor and enforce compliance with those obligations. This structure is especially important for regulating a complicated and massive system like the District's MS4, because it simplifies the otherwise overwhelming (or even impossible) task of amassing independent evidence of permit violations caused by an interconnected network of thousands of storm drains and outfalls.

The consequence of the District's argument is that its permit, in effect, could never be enforced against it, and the protections of the Clean Water Act would not apply to the most significant source of pollution into the Los Angeles and San Gabriel Rivers. The District openly admitted this result below, testifying that, under its theory, it could never be liable for violating the permit, even if discharges from its outfalls "were so polluted with oil and grease that they were on fire as they came out of the system." JA 303-304. Yet the statute established an enforcement-friendly permitting regime as an exception to a complete ban on *any* discharge of pollutants into navigable waters. The District's adherence to its legal position has caused the very result the permit and the Act mean to prevent: persistent violations of water quality standards with no meaningful action to fix the problem.

III. The Remedy For Permit Violations Is Apportioned According To Each Permittee's Contribution

There is nothing inequitable about holding the District liable based on the precise terms of its permit. The permit mandates remedial efforts to achieve water quality standards without compelling any individual discharger to do more than its fair share. In particular, when violations of water quality standards are detected, the permit requires each permittee to take initially modest steps to identify and root out polluted runoff only within its jurisdiction. This

remedy is accomplished through an iterative process of enhanced monitoring and progressively tighter pollution control measures proposed and implemented by each permittee for its section of the MS4 alone. JA 98-99, 213.

A. Each Permittee Is Responsible For Its Own Discharges

The mass emission stations measure the discharges of multiple co-permittees. Thirty-two co-permittee cities plus the District discharge to the Los Angeles River upstream of the monitoring station in that river, and twenty-eight co-permittee cities plus the District discharge to the San Gabriel River upstream of the monitoring station in that river. JA 207-208. The District owns and operates more of the MS4 than all other co-permittees combined. Pet. App. 106.

If the monitoring stations reveal violations of applicable water quality standards, the results establish the liability of each upstream co-permittee. That is both fair and rational, because the dischargers chose this liability scheme for themselves in advance, JA 65, 418, 454, and because the permit includes a built-in, logical program to apportion responsibility according to each party's share. The permit confines each permittee's responsibility to "discharge[s] for which it is the operator." JA 93. The permit does not require the District to remedy any other discharger's contribution of pollutants; each permittee is required

to take steps only within its own jurisdiction and to clean up only its share. JA 104, 213.[21]

To redress violations of water quality standards, the permit requires the permittees to engage in a remedial process that imposes limited initial obligations. When violations of water quality standards are detected at the monitoring stations, upstream dischargers, coordinated by the District in its role as Principal Permittee, must propose enhanced monitoring to identify the precise source of the violation, adopt improved pollution control measures, and submit compliance reports that outline a plan to meet standards. JA 98-99, 213. This process is repeated with progressively tighter pollution controls and more narrowly focused monitoring until the violations are resolved. JA 213.

Thus, the permittees may be found liable based on the mass emission monitoring designated in the permit, which samples their commingled stormwater discharges, and each is then required to identify and abate its contribution to the documented pollution. JA 93, 104. A permittee must implement this enhanced

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[21] Respondents sued the District and not its co-permittee cities because the District controls the vast majority of the MS4 infrastructure that discharges polluted stormwater, and it makes sense to redress its contribution to permit violations first. Moreover, the District is in a unique position as the designated Principal Permittee, with the express responsibility to "[c]oordinate and facilitate activities necessary to comply" with the permit's requirements. JA 103.

pollution control only for "discharges within its boundaries." JA 104.

The permit does not impose "joint and several liability," as some of petitioner's *amici* claim, *see, e.g.*, Br. of Western Coalition of Arid States 7, because each permittee is responsible for remedying only its proportionate share of the harm. *Cf. Commonwealth v. Boston Edison Co.*, 828 N.E. 2d 16, 20 n.4 (Mass. 2005) ("Where joint and several liability applies, plaintiffs may recover their full damages from any liable party. . . . By contrast, under several liability, liable parties would pay according to their percentage of fault." (quotation omitted)). This is consistent with traditional tort principles. *See* Restatement (Second) of Torts § 433A(1)(b) & cmt. b (1965) (when multiple tortfeasors cause a single harm for which there is a reasonable basis for division of responsibility among the contributors, each is subject to liability only for the portion of the harm it caused); *id.* § 433B(2) (where the conduct of multiple actors "has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor"). Indeed, the circumstance in which several parties each discharge pollutants into a single water body is a classic hypothetical in tort law and a paradigmatic example of the imposition of several liability. *Id.* § 433B(2) cmt. c ("A typical case is the pollution of a stream by a number of factories which discharge impurities into it.").

The permit's requirement for collective monitoring and an iterative process for stormwater control makes particular sense with a jurisdiction-wide MS4 permit. The Clean Water Act allows MS4 permits to be issued on a jurisdiction-wide basis when a number of entities operate an interconnected system. 33 U.S.C. § 1342(p)(3)(B)(i); 40 C.F.R. § 122.26(a)(3)(ii). Congress sought to provide a more efficient, streamlined permitting program, while also ensuring that stormwater discharges would not escape regulation and the Act's water quality objectives would not be frustrated. When more than one entity applies for a joint permit, as the District and its co-permittees did here, they agree to accept the responsibilities necessary to ensure effective coordination. 40 C.F.R. § 122.26(d)(2)(vii). This alleviates the administrative difficulty of writing a permit for each of the 86 municipal dischargers individually. And the District and its co-permittees benefit from jurisdiction-wide permitting, because it allows them to reduce the administrative burden and share program responsibilities, including saving on the up-front costs of individual monitoring.

Under petitioner's view, it has no legal responsibility despite widespread and undisputed water quality violations to which municipal stormwater discharges undeniably contribute. This thwarts a core purpose of the NPDES program and this MS4 permit, which is to ensure accountability for unlawful pollution.

B. Holding The District Liable Would Not Make It Responsible For The Contributions Of Other Dischargers

The District claims that other dischargers, including upstream industrial facilities and construction sites, may contribute additional pollution to the Los Angeles and San Gabriel Rivers. Pet. Br. 10 (referring to other entities that "may" discharge to rivers within Los Angeles County), 47 (referencing upstream industrial and construction sources). This argument is "irrelevant to liability under the permit." Pet. App. 116 n.9. The permit prohibits MS4 discharges that cause "or contribute to" exceedances of water quality standards. JA 97. The existence of upstream dischargers that may *also* contribute pollutants to these rivers thus has no bearing on the District's liability.

The District also complains that other parties add pollutants into the District's MS4 prior to discharge, but the permit obligates the District to limit and manage those additions into its MS4. *See, e.g.*, JA 109 (permittees must have sufficient authority to hold all dischargers to the MS4 within their jurisdiction "accountable for their contributions of pollutants and flows"), JA 120-122 (permittees must identify and track critical sources of pollutants in stormwater), JA 166-167 (permittees must identify and eliminate illicit connections to the MS4). This is exactly the sort of regime Congress intended to establish when it imposed the permitting burden for controlling urban stormwater runoff at the municipal level, rather than

requiring individual regulation of countless parking lots, homes, schools, and other potential contributing sources within every city. It is therefore no excuse to say that third parties connecting to the District's MS4 may be generating the pollutants that the District ultimately discharges. *Miccosukee*, 541 U.S. at 105 (holding that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters' ").

C. The District's Arguments Regarding Potential Future Remedies Are Both Incorrect And Premature

The District dramatically overstates the likely scope of any future remedy by claiming that a finding of liability would require it to "incur the substantial cost of building and operating water treatment facilities." Pet. Br. 49. The permit imposes a far more measured approach, under which the discovery of a violation triggers additional factfinding designed to discern the scope and extent of each permittee's contribution, followed by targeted pollution control measures proposed and implemented by each permittee. JA 213. The permit does not compel the draconian result depicted in petitioner's brief.

Respondents have never asked that the District build treatment plants for stormwater, and such a remedy would be unnecessary even if it were possible. There are dozens of practical steps the District can take to abate stormwater pollution, including

installing infiltration basins, porous pavement, and grass swales to lessen runoff entering the MS4, and intensifying street cleaning, debris removal, facility inspections, and public education campaigns to minimize stormwater pollutants at their source. 55 Fed. Reg. at 48,054-55; *see generally* Br. of Heal the Bay.[22]

Furthermore, the district court has equitable discretion to design appropriate injunctive relief for permit violations, and injunctive relief does not follow automatically from a finding of liability. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12, 317-18 (1982); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."). The district court would therefore be required to take into account the District's arguments about cost and feasibility. *Weinberger*, 456 U.S. at 312.

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[22] The District is wrong that it can "effectively exercise no control" over its discharges of pollution. Pet. Br. 26. MS4 operators exercise substantial control over the introduction of pollutants into storm sewers and the subsequent discharge of those pollutants into the nation's waters; that is the premise underlying Congress's regulation of stormwater discharges from MS4s rather than the innumerable individual sources that add pollution into each MS4. Standard stormwater management programs and landscape architecture strategies referred to as green infrastructure can successfully minimize runoff pollution, restore urban rivers, provide economic benefits, and increase quality of life for local communities. *See generally* Br. of Heal the Bay.

To the extent that achieving permit compliance imposes pollution control burdens on the District, those burdens are mandated by the Clean Water Act. Congress amended the statute in 1987 to redress urban stormwater pollution in a balanced way, in light of the recognized health and environmental risks, the practical challenges of regulation, and EPA's failure to implement any workable solution for fifteen years. Congress chose not to regulate every individual source of stormwater pollution within a city, and instead to require regulation at the municipal level. The statute is explicit that discharges from large MS4s must be subject to NPDES permits, and the District's complaints about the difficulty of complying with such a permit should be directed to Congress, not this Court.

The District's argument against a hypothetical future remedy is also premature. Because there have not yet been any remedy proceedings in this case, there has been no apportionment of the District's responsibility or any analysis of appropriate injunctive relief. Nor has there been discovery into the range of options available to the District to eliminate its pollutant contributions, and at what cost. The District is free to argue in those future proceedings that a particular remedy is unwarranted or unduly burdensome.

Finally, the District suggests that requiring it to control stormwater pollution could undermine its flood control efforts, endangering lives and property. Pet. Br. 25. This is not true. First, the District has

multiple obligations under the state law that created and governs it, including minimizing flood risk *and* preventing harm from stormwater pollution. Cal. Water Code App. § 28-2 (L.A. County Flood Control Act). Second, the same solutions that would ameliorate permit violations would make the region less, not more, susceptible to flooding, by promoting natural filtration of stormwater that would diminish discharges from the District's MS4. *See* 53 Fed. Reg. at 49,458 ("A well-developed storm water management program can reduce the amount of pollutants in storm water discharges as well as benefit flood control objectives."). The Regional Board, when it adopted the permit, found that the benefits of permit implementation would include *reduced* flood damage, fewer illnesses from swimming in contaminated water, improved aesthetic value, and better drinking water quality. C.A. ER 309-310 (Regional Board Fact Sheet and Staff Report). Permit compliance will therefore strengthen, not compromise, the District's flood control efforts.

IV. The District Raises A Series Of Legal Issues That Are Not Properly Before The Court Or Are Irrelevant To Its Liability

A. Man-Made Improvements To A Navigable Water Do Not Affect Clean Water Act Jurisdiction

Petitioner devotes a substantial portion of its brief to arguing an additional question presented in its petition for certiorari that the Court declined to

review: whether man-made improvements to a waterbody alter its status as a navigable water under the Clean Water Act. Eleven pages of argument in the District's merits brief are copied verbatim from the argument in support of the first (and rejected) question presented in the petition for certiorari. *Compare* Pet. Br. 35-43 & 51-52 *with* Pet. for Cert. 27-31 & 34-38.

The District's argument is based on an obvious misreading of the court of appeals' opinion. The court explicitly held that the Los Angeles River and San Gabriel River are navigable waters, Pet. App. 42, even though parts of each river have been lined with concrete. *See* U.S. Cert. Br. 17 ("[T]he court of appeals did not endorse the broad (and manifestly erroneous) proposition that petitioner attributes to it."). Moreover, there is no dispute between the parties on this question. Resp. Br. in Opp. 10. Whether a body of water is man-made or improved is irrelevant to whether it is a navigable water subject to the protections of the Clean Water Act.

B. The District's Argument That "Point Sources" And "Navigable Waters" Are Mutually Exclusive Was Never Presented Below And Does Not Affect Its Liability

Citing the plurality opinion in *Rapanos*, 547 U.S. at 735, the District argues for the first time that the terms "point source" and "navigable waters" are

mutually exclusive, and therefore the portions of the rivers that have been channelized to convey storm-water are solely navigable waters and not part of its MS4. Pet. Br. 40-44. This new argument is the opposite of the position the District took in the court of appeals, in which it argued that the rivers and the MS4 were "one and the same." C.A. Reh'g Pet. 2 ("Because the MS4 and each river are not distinct water bodies but rather one and the same, there could be no 'discharge' as a matter of law."); *id.* 4 ("The MS4 and each of the rivers are not separate and distinct bodies of water.").

There is no need for the Court to decide whether, or under what circumstances, a body of water can be both a "point source" and a "navigable water" under the Clean Water Act. *See* U.S. Merits Br. 13 & n.5 ("The proper disposition of this case does not turn on the choice between those characterizations."). The District is plainly subject to NPDES permit requirements because it discharges from an MS4 – including from thousands of classic point source pipes, drains, and outfalls – into the Los Angeles and San Gabriel Rivers, both of which are unquestionably navigable waters. Pet. App. 42; U.S. Merits Br. 13 ("[T]he salient point is that the channelized portions of the rivers are 'waters of the United States,' whether or not they are *also* part of the MS4.").

C. EPA's Water Transfer Rule Does Not Apply To Discharges From An MS4

The District also relies on EPA's 2008 water transfer rule, 40 C.F.R. § 122.3(i), to argue that it should not be liable for violating its permit. Pet. Br. 33. In promulgating that rule, however, EPA twice explained that it does not apply to discharges from MS4s. 73 Fed. Reg. at 33,702 n.7, 33,705.

The water transfer rule provides that water transfers between navigable waters that are not subject to intervening industrial, municipal, or commercial use do not require a permit. 73 Fed. Reg. at 33,697. EPA expressly clarified that this rule does not apply to MS4s, stating that "[m]unicipal separate storm sewer systems . . . are clearly subject to regulation under the Act. CWA section 402(p)." *Id.* at 33,702 n.7. EPA explained: "The Clean Water Act also clearly imposes permitting requirements on . . . large and medium municipal separate storm sewer systems. . . . [T]his interpretation regarding water transfers does not affect EPA's longstanding regulation of such discharges." *Id.* at 33,705.

Accordingly, the District's argument has no basis. The water transfer rule does not implicate regulation of MS4s, let alone enforcement of an existing MS4 permit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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33 U.S.C. § 1318. Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title –

> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

* * *

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33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on

the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

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33 U.S.C. § 1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under

paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * *

40 C.F.R. § 122.2 Definitions.

* * *

Discharge of a pollutant means:

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

* * *

40 C.F.R. § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25)

* * *

(d) Application requirements for large and medium municipal separate storm sewer discharges. The operator of a discharge from a large or medium municipal separate storm sewer or a municipal separate storm sewer that is designated by the Director under paragraph (a)(1)(v) of this section, may submit a jurisdiction-wide or system-wide permit application. Where more than one public entity owns or operates a municipal separate storm sewer within a geographic area (including adjacent or interconnected municipal separate storm sewer systems), such operators may be a coapplicant to the same application. Permit applications for discharges from large and medium municipal storm sewers or municipal storm sewers designated under paragraph (a)(1)(v) of this section shall include;

* * *

(2) Part 2. Part 2 of the application shall consist of:

(i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:

* * *

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with

permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

* * *

(iii) Characterization data. * * * The applicant must provide information characterizing the quality and quantity of discharges covered in the permit application, including:

* * *

(D) A proposed monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment.

* * *

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40 C.F.R. § 122.41 Conditions applicable to all permits (applicable to state programs, see § 123.25)

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

* * *

(j) Monitoring and records.

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR Part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

* * *

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40 C.F.R. § 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25)

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

* * *

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

* * *

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(*l*) (1), (4), (5), and (6) at least annually.

* * *

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40 C.F.R. § 122.45 Calculating NPDES permit conditions (applicable to State NPDES programs, see § 123.25)

(a) Outfalls and discharge points. All permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.44(k) (BMPs where limitations are infeasible) and paragraph (i) of this section (limitations on internal waste streams).

* * *

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40 C.F.R. § 122.48 Requirements for recording and reporting of monitoring results (applicable to State programs, see § 123.25)

All permits shall specify:

* * *

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

* * *

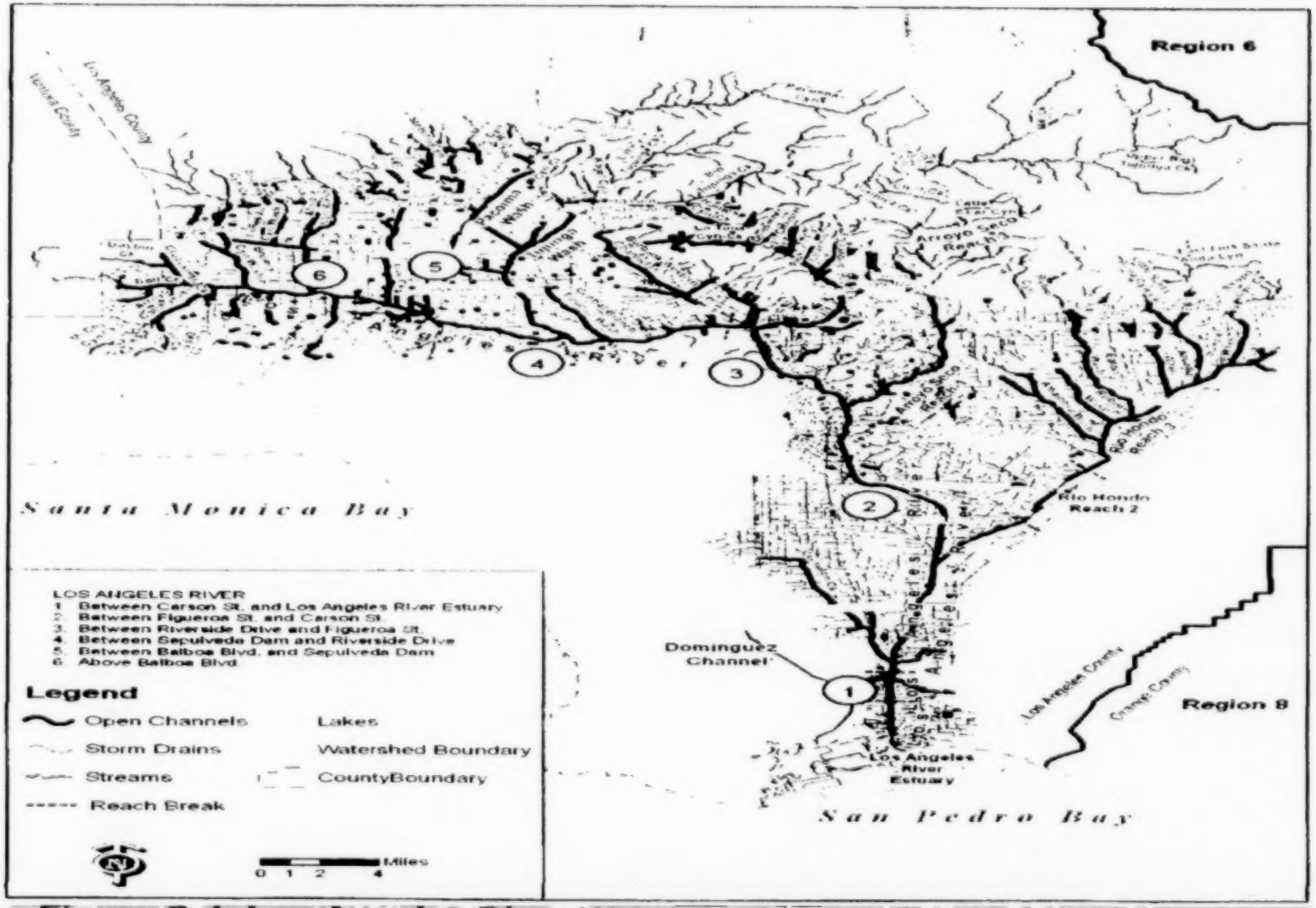

Figure C-4: Los Angeles River Watershed Management Area

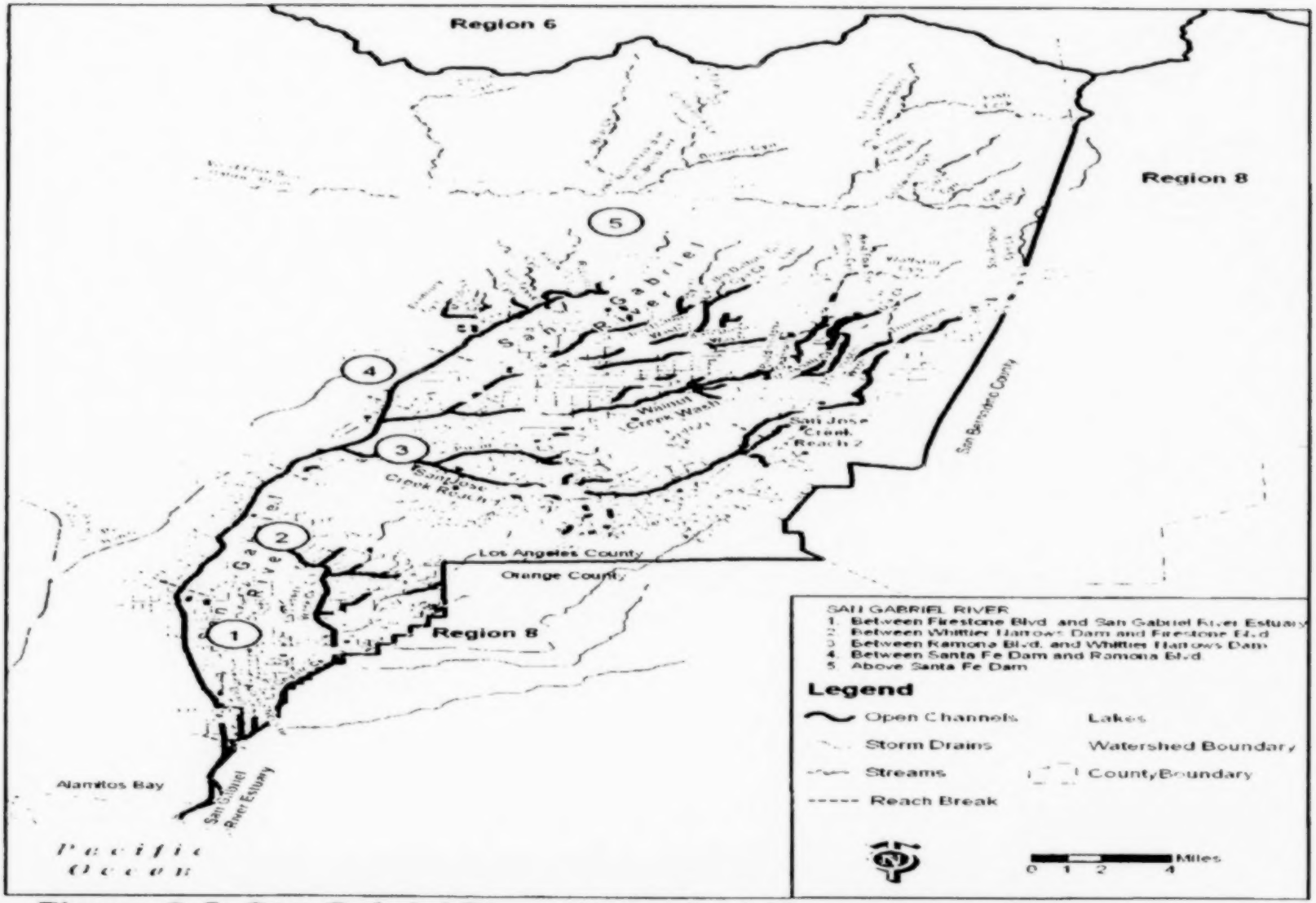

Figure C-5: San Gabriel River Watershed Management Area Flow Schematic

REPLY BRIEF

No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONER

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I. RESPONDENTS' CONCESSION THAT THE ONLY ISSUE PROPERLY BEFORE THE COURT ON CERTIORARI MUST BE RESOLVED IN FAVOR OF THE DISTRICT, MANDATES REVERSAL WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THE DISTRICT.

The Court granted certiorari to address a single question: When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act ("CWA"), notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

Respondents agree with the District, the United States and amici for both sides that the answer to that questions is, "no." That ends the case.

The Ninth Circuit's sole ground for finding a Permit violation by the District was its conclusion that a "discharge" from a "point source" occurred under the CWA when polluted water flowed through the monitoring stations located in improved portions of the San Gabriel and Los Angeles Rivers and then into "naturally occurring" portions of the rivers. (Appendix to Petition for Writ of Certiorari, "App." 45.) The Ninth

Circuit's reasoning may have been erroneous, but that is plainly what the court held. Hence, while the District (contrary to respondents' accusation) acknowledges that it discharges stormwater from its MS4 through outfalls into the rivers upstream of the monitoring stations (Brief of Petitioner 44), the only "discharge" from a "point source" that exceeded water quality standards found by the Ninth Circuit was based on the mere transfer of water through the monitoring stations within the rivers – in direct contravention of *Miccosukee* and the EPA's own regulations that make it clear that an MS4 *is* distinct from a navigable water.[1]

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[1] The United States' suggestion that a navigable water may also be an MS4, and the Court should leave the issue open (Brief of United States As Amicus Curiae (Merits), "USACM" 13) is difficult to reconcile with the EPA's regulatory definition of an MS4 as distinct from navigable waters (Brief of Petitioner 42-43) and the preamble to the initial proposed MS4 rules stating that "water bodies that are waters of the United States are not storm sewers for the purposes of this rule" and that "stream channelization, and stream bed stabilization, which occur in waters of the United States" are not subject to an NPDES permit. 53 Fed. Reg. 49416, 49442 (December 7, 1988). Given that the "reach of the Clean Water Act is notoriously unclear," and the term "waters of the United States" is in many respects "hopelessly indeterminate" (*Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring)), as well as the need to underscore that the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories" (*Rapanos v. United States*, 547 U.S. 715, 735 (2006)), the Government's reluctance to clarify the distinctions between MS4s and navigable waters seems misplaced.

Repeating what they argued in opposing certiorari, respondents assert that the Ninth Circuit was simply mistaken about the locations of the monitoring stations. (Brief for Respondents, "BFR" 30-31.) That contention is untenable – everything in the record, *including respondents' briefs*, made it manifest that the monitoring stations were in channelized portions of the Los Angeles and San Gabriel Rivers. (*See* Supplemental Brief of Petitioner 5-6; Opening Brief of Appellants, Ninth Cir. Dkt. No. 13 at 13-14 ["Two of these mass emissions stations – those in the Los Angeles River and the San Gabriel River – are located within the portion of the MS4 owned and operated by the Flood Control District. ER 11. (The MS4 includes channelized portions of both rivers.)"].) The opinion cites to the Los Angeles County Department of Public Works' website as identifying the locations of the monitoring stations and the site clearly states that the monitoring stations are within the rivers. (*See* Petitioner's Reply to Brief in Opposition at 3 n.1, citing App. 18 n.4.) And it was certainly made clear in the District's petition for rehearing, in response to which respondents did not suggest, let alone correct, any purported factual mistake in the opinion, nor for that matter attempt to reconcile the Ninth Circuit's holding with *Miccosukee*. (Appellants' Response to Petition for Rehearing, Ninth Cir. Dkt. No. 45.)

In holding that there was a discharge from an MS4 under the CWA, the Ninth Circuit expressly found a "discharge" as a matter of fact and law. (App. 44.) The Ninth Circuit's "fact" is that the monitoring

stations were located in portions of the Los Angeles and San Gabriel Rivers maintained by petitioner for flood control purposes. The "law" is that, under the court's view, an MS4 is distinct from a navigable body of water: "the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River." (App. 44.) If the Ninth Circuit only premised its opinion on the mistaken factual assumption that the monitoring stations were in channels that discharged *to* the rivers, not *within* the rivers, there would be no reason to hold that as a "matter of law" these channels are somehow distinct from the rivers. The Ninth Circuit specifically held that as part of an MS4, the channels were "intra-state" and "man-made construction[s]" distinct from "naturally occurring Watershed River[s]." These terms speak to the legal status of an MS4, not its physical location.

Even assuming the Ninth Circuit was mistaken about the location of the monitoring stations, the case still commands this Court's intervention. The Court has not hesitated to summarily correct gross factual errors by the Ninth Circuit. *Cavazos v. Smith*, ___ U.S. ___, 132 S. Ct. 2, 7 (2011) (per curiam) (reversing and noting that factual assertion in Ninth Circuit opinion "is simply false"). If the Ninth Circuit's decision is not reversed, the District faces exposure to a potentially massive fee award as well as civil penalties and unpredictable potential costs of rectifying alleged "discharges" based on what respondents concede is, at best, a gross factual error. Common sense and judicial propriety counsel that public funds

should not be diverted from vital flood protection absent a legitimate legal basis for doing so.

Nor is any purported factual error apparent on the face of the opinion. Nowhere does the Ninth Circuit suggest that the monitoring stations are anywhere other than in the rivers. The opinion says what it says, and what it says is alarming – that there is a "discharge" under the CWA when waters flow from a channel that is an "intra-state man-made" structure within a river and exits into the "naturally occurring Watershed River." This holding is untethered to any specific term of the Permit; hence, contrary to respondents' assertion (BFR 21 n.9), revision of the Permit does not dispel the pernicious impact of the opinion.[2]

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[2] A renewed permit was approved on November 8, 2012: http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Order_11-5-12.pdf (accessed Nov. 15, 2012). The renewed permit has not yet been posted on the Regional Water Board's website. The version considered at the hearing can be found by clicking the link "Tentative Order No. R4-2012-XXX" at http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/index.shtml (accessed Nov. 15, 2012).

While the renewed permit includes provisions for outfall monitoring, it does not change the term of the Permit on which the Ninth Circuit premised liability. The old permit prohibits discharges that cause or contribute to violations of water quality standards or water quality objectives. (App. 15, 41-42.) The renewed permit contains the same prohibition. (*See* Section V., Receiving Water Limitations, prohibiting discharges that cause or contribute to violations of "receiving water limitations" and attachment A defining "receiving water limitations" to include water quality objectives. Page 38 of http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_

(Continued on following page)

Neither petitioner nor its 47 amici from across the nation should be sanguine that administrative agencies and courts will ignore the plain holding of the Ninth Circuit's opinion. As the amici underscore, the mischief created by this opinion impacts not simply the critical area of stormwater control through MS4s but essentially every facet of water transfer and management.[3] There is nothing improvident about this Court's intervention – the Ninth Circuit's opinion cannot remain in place.

All parties to this case agree that the only ground on which the Ninth Circuit imposed liability on the District – a discharge premised solely on water moving through the monitoring stations within the rivers – is untenable. That is dispositive, and there are no remaining issues for resolution of these claims by any court. The suggestion of the United States that

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ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Order_11-5-12.pdf (accessed Nov. 15, 2012); pages A-16 to A-17 (http://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/la_ms4/Revised/2nd%20REVISED%20TENTATIVE%20-%20Attachment%20A_11-5-12.pdf (accessed Nov. 15, 2012).

Since the same provision that respondents contend the District violated has been retained in the renewed permit, the Ninth Circuit's construction of "discharge" would continue to apply.

[3] *See, e.g.*, Brief of Amici Curiae City of New York, et al., in Support of Petitioner, 10-11 (impact on water supply infrastructure); Brief of Amici Curiae Nationwide Public Projects Coalition, et al., in Support of Petitioner, 12-13 (impact on irrigation and general water transfer); Brief of Amici Curiae National Hydropower Association, et al., in Support of Petitioner, 19-25 (impact on hydroelectric power projects).

remand is appropriate for further development of the record and consideration of supposedly open issues (USACM 17-19, 24-26), is belied by the record.

There is no basis to remand for the Ninth Circuit to determine whether respondents submitted evidence of discharges from the District's outfalls above the monitoring stations. The district court gave respondents two opportunities to submit such evidence and after examining the evidence closely, properly concluded that respondents failed to show a discharge from the District outfalls that caused or contributed to the exceedances. (App. 100-02, 120-22.)

In the Ninth Circuit respondents abandoned any pretext of showing a discharge from District outfalls. They did not argue that the district court erred in construing the evidence. They disclaimed any obligation to show a discharge. The *only* argument they asserted in the Ninth Circuit was the monitoring argument that they attempt to resurrect here. As respondents put it: "This appeal presents one legal question only: whether the self-monitoring required by the Permit to determine compliance establishes the County's and Flood Control District's liability for Permit violations as a matter of law." (Appellants' Opening Brief, Ninth Cir. Dkt. No. 13 at 5; *see also infra* n.4.)

The Ninth Circuit, however, expressly rejected respondents' monitoring argument, and since it was dispositive of two claims in the District's favor that are not before this Court, it cannot be reargued here. (*See infra* section II.)

There is nothing left to be determined on remand. The Ninth Circuit already considered and rejected the monitoring argument. Respondents abandoned any other argument. The judgment of the Ninth Circuit should be reversed with directions that judgment be reinstated for the District on the San Gabriel and Los Angeles River claims.

II. RESPONDENTS' MONITORING ARGUMENT IS NOT PROPERLY BEFORE THE COURT.

Respondents resurrect the only argument they made in the Ninth Circuit and which the court soundly rejected, namely that respondents could establish a permit violation by the District (and theoretically all 85 co-permittees) merely by showing that the monitoring stations within the four subject rivers detected exceedances of water quality standards. Respondents assert via a footnote that they may do this without having filed a cross-petition because this is merely an "alternative ground [that] would sustain and not change the judgment." (BFR 34 n.14.) Not so. Resolution of this argument in respondents' favor in this Court necessarily undermines petitioner's success on two claims not before this Court involving the Santa Clara River and Malibu Creek. Hence, respondents were required to file a cross-petition to preserve their argument.

In defining the obligation of a respondent to cross-petition in order to invoke the jurisdiction of this

Court to address a particular argument, the Court has repeatedly recognized that if the rationale of an argument would undermine un-reviewed portions of a judgment in a petitioner's favor, a cross-petition must be filed.

In *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994), the Sixth Circuit had found that airlines had a private right of action under the Anti-Head Tax Act ("AHTA") 49 U.S.C. §1513(a), to challenge various fees levied by a municipal airport. 510 U.S. at 361. It upheld the bulk of fees, but agreed with the airlines that some fees were improperly calculated and remanded for a reduction. *Id.* at 362. The airlines then sought review in this Court, arguing that the AHTA barred imposition of any fees. However, the airport did not cross-petition for review of the Sixth Circuit's decision to the extent that it favored the airlines, specifically the remand to the district court for allocation of costs the Sixth Circuit had found to be improper under the statute. *Id.*

In this Court, the airport attempted to resurrect its argument that the airlines had no right to enforce the AHTA through a private right of action, asserting that this was simply another ground on which to affirm the judgment below, since if there was no private right of action there would be no basis for the airlines to challenge the costs at issue. *Id.* at 364. The Court, however, refused to consider this argument, noting that acceptance of the argument would repudiate that portion of the Sixth Circuit judgment in

petitioner's favor with respect to allocation of costs and that the airport had failed to cross-petition:

> A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment. [Citation.] A cross-petition is required, however, when the respondent seeks to alter the judgment below. [Citation.] Alteration would be in order if the private right of action question were resolved in favor of the Airport. For then, the entire judgment would be undone, including the portion remanding for reallocation of CFR costs between the Airlines and general aviation. The Airport's failure to file a cross-petition on the CFR issue – the issue on which it was a judgment *loser* – thus leads us to resist the plea to declare the AHTA claim unfit for District Court adjudication.

Id. at 364-65 (emphasis in original).

In *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), various utility companies and several states challenged license fees imposed on imported oil via Presidential proclamation. The district court rejected the challenge, but the Court of Appeals reversed and invalidated the entire regulatory scheme imposing fees. The federal government successfully petitioned for certiorari. Respondents argued that at least a portion of the import fees, based upon geographical differences, would violate Article I, Section 8 of the Constitution, requiring uniform

import duties throughout the United States. 426 U.S. at 560 n.11. The Court refused to consider the issue:

> Sustaining respondents' Uniformity Clause argument would call, not for invalidation of the entire license fee scheme, but only for elimination of the geographical differences in the exemptions allowed under it. This would represent not an affirmance of the judgments below, which effectively invalidated the entire scheme and its implementing regulations, but rather a modification of those judgments. But since respondents filed no cross-petition for certiorari, they are at this point precluded from seeking such modification.

Id.

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), airline employees brought a suit under the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, against an airline and union for allegedly discriminating against pilots over the age of 60. After the district court granted summary judgment to the union and the airline, the Court of Appeals reversed, finding that both defendants had violated the ADEA. 469 U.S. at 118; *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 955-56 (2d Cir. 1983). The Second Circuit held that the airline's violation of the ADEA was willful and hence plaintiffs would be entitled to an award of liquidated or double damages. 713 F.2d at 956-57. The court found, however, that under the ADEA, the

union, although liable, was not subject to a damages award. *Id.* at 957.

The airline petitioned for certiorari, challenging the appellate court's holding that its policies violated the ADEA, that the violation was willful, and that the union could not be subject to a damages award. 469 U.S. at 119 n.14, 120. The union cross-petitioned on the appellate court's finding that it had violated the ADEA. *Id.* at 120. The Court granted both petitions, but declined to determine whether the union could be subject to damages in the event the liability finding was affirmed, because the airline lacked standing to assert the issue and the other respondents had not cross-petitioned:

> A prevailing party may advance any ground in support of a judgment in his favor. An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed. In this case, the judgment of the Court of Appeals would be modified by the arguments advanced by the EEOC and the individual plaintiffs, as they are contending that the Union should be liable to them for monetary damages.

Id. at 119 n.14 (citations omitted).

Similarly, in *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426 (1941) and *National Labor Relations Board v. International Van Lines*, 409 U.S. 48 (1972) the NLRB sought review in this Court to fully reinstate cease and desist orders that had been pared down by the circuit courts. In

each case, the Court refused to allow the respondent employers to urge affirmance of the truncated orders by arguing that there was no basis for any relief at all, because to do so would repudiate the circuit court judgments and respondents had failed to cross-petition. *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. at 431; *National Labor Relations Board v. International Van Lines*, 409 U.S. at 52 n.4.

Here too, the argument respondents seek to assert concerning the monitoring station results as *ipso facto* establishing the District's liability for any exceedances under the Permit is not properly before the Court. Respondents failed to file a cross-petition in order to preserve that issue – an issue expressly resolved against them by the Ninth Circuit in affirming the district court judgment in favor of the District on two other waterways – the Santa Clara River and Malibu Creek.

In the district court and in the Ninth Circuit, respondents asserted that the District was liable for exceedances in violation of the Permit terms with respect to the San Gabriel, Los Angeles and Santa Clara Rivers, and Malibu Creek. Respondents offered only a single theory of liability as to *all four* bodies of water – that exceedances measured at the monitoring station within each of the four bodies of water established the liability of the District (as well as the County of Los Angeles) for violation of the Permit.[4]

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[4] *See* Opening Brief of Appellants, Ninth Cir. Dkt. No. 13 at 3, 13-16.

In affirming judgment for the District with respect to plaintiffs' claims concerning alleged Permit violations in the Santa Clara River and Malibu Creek, the Ninth Circuit expressly rejected the argument that respondents attempt to resurrect here, i.e., that exceedances at the mass emissions monitoring stations *ipso facto* established the District's liability. (App. 41-42, 47-48.):

> Plaintiffs have argued throughout this litigation that the measured exceedances in the Watershed Rivers *ipso facto* establish Permit violations by Defendants. Because these points are designated in the Permit for purposes of assessing "compliance," this argument is facially appealing. But the Clean Water Act does not prohibit "undisputed" exceedances; it prohibits "discharges" that are *not* in compliance with the Act, which means in compliance with the NPDES. *See* 33 U.S.C. § 1311(a); *see also Miccosukee Tribe*, 541 U.S. at 102. While it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant. Indeed, the Permit specifically states that "*discharges* from the MS4 that cause or contribute to the violation of the Water Quality Standards or water quality objectives are *prohibited*."

(App. 41-42 (emphasis in original).)

Having determined that plaintiffs were required to prove a discharge from the District's MS4 into the rivers, the court found a discharge into the San

Gabriel and Los Angeles Rivers based upon what all parties now concede is flatly untenable under the CWA and *Miccosukee*, i.e., that a discharge occurred when water flowed through the monitoring stations located in portions of the rivers channelized by the District for flood control purposes. (App. 45.) The court then found that respondents had failed to show any discharge into the Santa Clara River and Malibu Creek from the District's MS4 that flowed past the monitoring stations. (App. 47-48.)[8]

Respondents are not simply asserting an additional argument for affirming the judgment; rather, they are raising a contention that, if accepted by the Court, squarely repudiates the Ninth Circuit's affirmance of judgment in favor of the District on the Malibu Creek and Santa Clara River claims. Respondents, in the words of *Northwest Airlines*, were the "judgment losers" on those claims, and acceptance of their argument here would not affirm, but as in *Algonquin SNG*, effectively modify an existing judgment which

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[8] Contrary to the suggestion of the United States (USACM 23), this further dispels, rather than supports any supposition that the Ninth Circuit was somehow factually mistaken about the location of the monitoring stations in the Los Angeles and San Gabriel Rivers. While the monitoring stations for Malibu Creek and the Santa Clara River were within those rivers, as the court noted, respondents did not explain how the District's MS4 related to the monitoring stations. This is in contrast to the monitoring stations for the San Gabriel and Los Angeles Rivers, which respondents squarely stated were located in portions of the rivers channelized by the District. (Brief of Appellants, Ninth Cir. Dkt. No. 13 at 13-14.)

expressly rejected respondents' contention in affirming judgment for the District on the Malibu Creek and Santa Clara River claims.[6] As *Northwest Airlines, Algonquin SNG, Trans World Airlines, Express Publishing Co.* and *International Van Lines* make clear, respondents were required to file a cross-petition to properly invoke the jurisdiction of this Court to consider their monitoring argument.

Respondents' failure to cross-petition is particularly egregious, as their contention was raised in their brief in opposition to certiorari, yet was not presented as an issue for a cross-petition, perhaps because it might underscore the importance of the issue presented in the petition. Moreover, by not candidly presenting an entirely separate issue than the one on which certiorari was granted,[7] respondents have effectively "sandbagged" petitioner – presenting a full-blown (if meritless) argument in almost 30 pages of briefing, with petitioner's response being necessarily constrained by the limitations of a reply brief. In addition, 47 amici in support of petitioner have provided thoughtful commentary on the significance of the Ninth Circuit decision as written and on the

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[6] Accepting respondents' belated argument would also produce the anomalous result of affirming judgment for the County of Los Angeles based on the Ninth Circuit's rejection of the monitoring argument while simultaneously imposing liability on the District based on that same theory.

[7] The United States agrees that the issue is "well outside the question on which this Court granted certiorari." (USACM 27.)

issue for certiorari framed by this Court. Allowing respondents to belatedly shift the focus to an entirely different point deprives the Court of the benefit of the expertise that these amici can provide.

Since respondents failed to preserve their monitoring argument by filing a cross-petition, there is no basis for the Court to consider the issue.

III. RESPONDENTS' MONITORING THEORY IS CONTRARY TO THE CWA AS EMBODIED IN THE PERMIT, WHICH IMPOSES LIABILITY ONLY WHERE IT IS SHOWN THAT A PERMITEE HAS DISCHARGED IN VIOLATION OF PERMIT TERMS.

Respondents' argument is straightforward. All NPDES permittees are required to engage in monitoring, including monitoring that may be conducted in-stream as opposed to at the permittee's outfall. According to respondents, the District (and all 85 other co-permittees) "agreed" that the mass emissions monitoring stations within the watershed rivers would be used to determine the liability of each individual permittee for any exceedances, without proof that any individual permittees themselves discharged substances contributing to the exceedances. Respondents contend that system-wide permits in general and this Permit in particular impose liability on all permittees without proof that a permittee's discharge in fact caused or contributed to the exceedances.

The district court and the Ninth Circuit rejected this contention as flatly inconsistent with the CWA and the Permit itself. As the Ninth Circuit noted, the Permit and the CWA do not prohibit "exceedances." (App. 41-42.) Rather, both prohibit "discharges" which violate the Permit's terms. (*Id.* (citing 33 U.S.C. §1311(a)).) Thus, respondents were required to provide evidence that District outfalls discharged storm water into the rivers containing the pollutants for which exceedances were detected at the monitoring stations. (App. 41-42.)

Respondents' argument essentially reads out of the CWA the statutory requirement that there be a "discharge" that adds pollutants to a navigable waterway. Rather, under respondents' view, a single permittee covered by a system-wide permit is deemed to have caused an exceedance measured at a monitoring station in a river, even though that station measures the collection of pollutants flowing in that river from all upstream permittees in the system, as well as natural sources and other NPDES and non-NPDES dischargers that discharge into the river, without evidence of any discharge by the permittee being held liable.

Neither the Act nor implementing regulations support respondents' position. Respondents flatly assert that municipal stormwater dischargers are necessarily subject to the same monitoring requirements as other NPDES dischargers. Yet, this is questionable given that municipal stormwater dischargers are expressly treated differently under the Act. 33 U.S.C.

§1342(p)(3)(A) states that: "Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title." As set forth in 33 U.S.C. §1342(a)(1), included among the "applicable provisions of this section" are the monitoring requirements of 33 U.S.C. §1318. Significantly, there is no similar requirement to "meet all applicable provisions of this section" for municipal dischargers. 33 U.S.C. §1342(p)(3)(B). If anything, under the plain language of the statute municipal dischargers, unlike industrial dischargers, may not be subject to "all applicable provisions of this section," including monitoring requirements, but rather, are subject to more flexible requirements as the "administrator or the State determines appropriate for the control of . . . pollutants." 33 U.S.C. §1342(p)(3)(B)(iii).

Moreover, even if a monitoring requirement could be read into the provisions concerning municipal stormwater dischargers, neither the statute, regulations nor common sense support the conclusion urged by respondents here. Although monitoring results from a location other than an outfall might properly be used to characterize an individual discharge, most particularly with a single municipal or industrial point source,[8] that does not mean that one can use

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[8] The only case respondents cite concerning monitoring other than at an outfall addresses internal monitoring for a waste treatment plant at a point *before* discharge into navigable waters. (*See* BFR 37, citing *Texas Mun. Power Agency v. Adm'r of the*

(Continued on following page)

monitoring results that do not characterize a specific discharge for the same purpose. This case illustrates the infeasibility of such a system, since the monitoring stations within the rivers do not measure the contribution of any single permittee but only the "mass emissions" within the river generated by *all* upstream permittees. The notion that the mass emission monitoring stations in the San Gabriel and Los Angeles Rivers can detect exceedances attributable to any particular permittee is untenable. The Regional Board staff member who served as the chief Permit drafter acknowledged that the monitoring stations were not in fact designed for that purpose. (*See* Supplemental Excerpts of Record, Ninth Cir. Dkt. No. 19 at 82, 144, 146-49.)

Nor did the District or any of its co-permittees "agree" that the monitoring stations would be used to affix individual liability on any permittee. The regulations require a permittee to propose an appropriate monitoring site, but as the United States notes, the regulatory agency retains final authority on the issue. (USACM 9; *see also* Excerpts of Record, Ninth Cir. Dkt. No. 15 at 353.) Moreover the Permit states that the monitoring site was selected to measure the contribution of the MS4, i.e., the collection system as a

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U.S. EPA, 838 F.2d 1482, 1489 (5th Cir. 1988).) The case does not suggest that monitoring at a point in a navigable water itself, where a permittee's discharges have been added to those of hundreds of others upstream, can be used to determine the liability of a particular discharger.

whole, not the discharge of any one permittee. The Permit states that the purpose of the mass emissions monitoring is to "(e)stimate the mass emissions *from the MS4*; (a)ssess trends in the mass emissions over time; and (d)etermine if the MS4 is contributing to exceedances of Water Quality Standards. . . ." (1 JA 219 (emphasis added).) This reference to "the MS4" as a whole and not to any individual permittee's MS4 belies any attempt to bootstrap this monitoring into some sort of compliance monitoring for individual permittees.

Contrary to the assertion of respondents and their amici, the District is not attempting to collaterally attack the terms of the Permit. Instead, the District is insisting that its plain terms be followed – that the District only be responsible for its own discharges and not for those of any co-permittee. If anything, it is respondents that are collaterally attacking the Permit terms. Had respondents wanted the Regional Board to impose permittee-specific outfall monitoring, as opposed to collective monitoring, they could have made this request during the permitting process or challenged the Permit after adoption. Respondents did not do so.

As the district court and Ninth Circuit correctly concluded, respondents, pursuant to the Permit's plain terms, were required to show that a permittee – here the District – contributed to the exceedances by submitting proof that the District discharged storm-water containing pollutants for which exceedances were detected. While respondents and their amici

attempt to paint a parade of horribles to the effect that this means the District and its co-permittees can never be held liable for discharges of pollutants into the rivers,[9] as the Ninth Circuit and district court found, respondents' problem was a failure of proof – they did not attempt to satisfy even the minimal burden of showing a discharge from any of the District's outfalls that caused an exceedance at the monitoring stations. Though respondents complain of the vast size of the MS4 and the District's MS4 in particular, and assert it would be impossible to sample what respondents describe as thousands of drains and outfalls (BFR 50 n.20, 52), as the district court and Ninth Circuit recognized, respondents could have satisfied their burden with something much less. (App. 48 ("[Appellants] could heed the district court's sensible observation and, for purposes of their evidentiary burden, 'sample from *at least one* outflow that included a standards-exceeding pollutant.'" (emphasis in original).)) Respondents simply failed to undertake that minimal effort.

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[9] Respondents go so far as to misleadingly cite a non-lawyer District employee's understanding as to whether the District could be held responsible for merely conveying as opposed to generating pollutants, to suggest the District is taking a legal position that it could not be held liable even for discharging flaming oil from its MS4 into the rivers. (BFR 53.) The District has always acknowledged that it is responsible for pollutants it conveys and discharges even if it did not originally generate the pollutants itself. Respondents' problem here was that they failed to present any evidence of a discharge of standards-exceeding pollutants.

Respondents' contention that all upstream permittees are liable for exceedances at the mass emissions stations cannot be squared with the Permit's clear statement – consistent with applicable regulations (40 C.F.R. §122.26(b)(1)) – that a permittee is responsible only for its own discharge. (1 JA 93.) Neither respondents nor any of their amici has identified any case where a discharger had been held liable for pollutants not in their discharge. Indeed, the lower court cases that have addressed the issue have found that a discharger is liable only for its own discharges or those over which it has control. *See Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent Cnty. Water Res. Dist.*, 876 F. Supp. 1081, 1888 (D. N.D. 1992). And the District certainly has no control over its co-permittees – while the District is identified as a principal permittee, all that imposes is an agreement to act as a coordinating entity for the other permittees – as the provision makes plain, the District is not responsible for ensuring compliance of any individual permittee. (1 JA 103-04.) While there may be actions the District can take within its own system to ameliorate pollution, it has no control over what co-permittees do in theirs. More significantly, there are over a thousand entities upstream from the monitoring stations that are not subject to the system-wide Permit that also discharge into the rivers (App. 20-21), and the District has no control over their actions either.

Respondents' entire argument is dependent upon parsing out "responsibility" as something different

than "liability" for a Permit violation. Thus, they contend that while all permittees are liable and subject to civil penalties and potentially injunctive relief anytime there is an exceedance measured at the monitoring stations, each will only be "responsible" to the extent it contributed to the exceedance – with the permittee itself required to prove the extent to which it did or did not contribute to the exceedance. (BFR 53-56.) But, under the CWA, a party's liability is premised upon a "discharge." 33 U.S.C. §1311(a). A party is not liable for exceedances of water quality standards where there is no discharge. Similarly, under the Permit, liability is the same as "responsibility." Indeed, the pertinent provision of the Permit does not use the term "liable," but only "responsible" and makes it clear that each permittee is only "responsible" for its own discharges. (1 JA 93.)

Respondents may have wished that the Regional Board had imposed individual monitoring requirements on each permittee. But the Regional Board did not do so, nor did respondents request it to do so when the opportunity arose during adoption of the Permit. As the district court and Ninth Circuit recognized, the results of the monitoring could not establish the liability of any one permittee without evidence of a discharge by that permittee that contributed to the exceedances measured at the monitoring stations. The Ninth Circuit properly rejected respondents' argument, and this Court should as well.

CONCLUSION

For the foregoing reasons, petitioner requests that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions that judgment for petitioner be reinstated.

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SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 11-460

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Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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INTRODUCTION

The Ninth Circuit's opinion in this case is so squarely at odds with the decisions of this Court and the provisions of the Clean Water Act ("CWA") that in its brief as amicus curiae the United States can only speculate that the decision must be based on a gross factual error. (Brief for the United States as Amicus Curiae ("BFUS") at 12, 14-15, 17-20.) Thus, somewhat incongruously, the United States urges the Court to deny certiorari based upon something the opinion does not say, while acknowledging that what the opinion *does* say is flatly contrary to governing law.

There are two problems with the Government's position.

First, the notion that the Ninth Circuit simply made an unknowing factual error is belied both by the record in the case – including a petition for rehearing pointing out the uncontested, and indeed incontestable fact that the water bodies containing the monitoring stations were channelized portions of the Los Angeles and San Gabriel Rivers themselves – and the plain language of the opinion stating that an MS4, even an MS4 within a navigable water of the United States, is nonetheless a "point source" for a "discharge" because an MS4 is a "man-made" construction somehow distinct from "naturally occurring" navigable waters.

Second, even assuming the opinion is purportedly based upon a purely speculative, unstated factual

error, this does nothing to ameliorate the uncertainty sown by the plain language in the Ninth Circuit's opinion concerning the interplay between MS4s and navigable waters of the United States. Neither petitioner, nor other public entities throughout the Ninth Circuit and across the nation, has the luxury of ignoring what *is* in the opinion in the faint hope that future courts will speculate as to what is not in the opinion, i.e., an unstated factual error about the location of the monitoring stations.

As the United States tacitly acknowledges, the reality is that liability under the CWA has been imposed on petitioner, even though under the governing law and undisputed evidence no such violation should be found. In an era where local government budgets are stretched to the breaking point, the notion that petitioner, which has as its core function the protection of the life and property of millions of citizens through basic flood control, may nonetheless be required to expend potentially millions of dollars to remedy a nonexistent permit violation, is indefensible. But even putting aside the unconscionable impact on petitioner, as the briefs from amici curiae across the nation make clear, the impact of the Ninth Circuit's opinion is not limited to petitioner or even to public entities within the Circuit. The Ninth Circuit's opinion creates mischief with respect to an ongoing and important issue for flood control agencies throughout the nation, namely, the interplay between MS4s and navigable waters of the United States.

This may indeed be a case where, based upon the governing law and the undisputed record before the Ninth Circuit, summary reversal is appropriate. It certainly would not be the first time in recent memory that the Ninth Circuit's disregard for both the law of this Court and the evidence before it necessitated review by this Court. *See Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 990 (2012) (per curiam) (reversing Ninth Circuit because "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case" and "[o]n the contrary, some of our opinions may be read as pointing in the opposite direction"); *Felkner v. Jackson*, ___ U.S. ___, 131 S. Ct. 1305, 1307 (2011) (per curiam) (reversing Ninth Circuit where "decision is as inexplicable as it is unexplained"); *Cavazos v. Smith*, ___ U.S. ___, 132 S. Ct. 2, 7 (2011) (per curiam) (reversing and noting that factual assertion in Ninth Circuit opinion "is simply false").

This is indisputably a case that requires intervention by this Court. As even the United States acknowledges, the plain language of the Ninth Circuit's opinion is squarely at odds with the governing authority of this Court and the language of the CWA, and as amici from across the country underscore, entities that must live with the language of that opinion now face uncertainty in performing the day-to-day basic planning of public flood control. Navigable waters are improved for flood control purposes throughout the country. Under the Clean Water Act,

"point sources" are distinct from navigable waters. It is vital that municipalities and flood control districts know whether an improvement to a navigable water for flood control purposes transforms that navigable water into an MS4, and if so, whether that transformation turns the MS4 into a "point source" under the CWA.

I. THE RECORD BEFORE THE NINTH CIRCUIT AND THE PLAIN LANGUAGE OF THE COURT'S OPINION BELIE ANY ASSUMPTION THAT IT IS BASED UPON AN UNSTATED FACTUAL ERROR CONCERNING THE LOCATION OF THE MONITORING STATIONS, NOR WOULD ANY SUCH PURPORTED UNSTATED ERROR ALTER THE DAMAGING IMPACT OF THE OPINION.

The United States acknowledges that, on its face, the Ninth Circuit's holding that there has been a "discharge" under the CWA for purposes of imposing liability on petitioner is flatly contrary to governing authority holding that mere artificial improvement of a navigable water of the United States does not alter its character. (BFUS at 17.) The United States further acknowledges that under *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), there cannot be a "discharge" under the CWA based upon the transfer of water within a single body of water. (BFUS at 19-20.) The United States submits, however, that certiorari is

unwarranted because, despite the plain language of the opinion, it should be inferred that the Ninth Circuit simply made a factual error – that the court somehow believed that the monitoring stations were in portions of petitioner's MS4s that were separate from the navigable waters, i.e., not within the rivers themselves. (BFUS at 12, 14-15, 17-18.)

Yet, the notion that the Ninth Circuit was somehow mistaken about the locations of the monitoring stations is unsupportable, in light of both the record before the Ninth Circuit and the language and reasoning of the opinion. Moreover, any such purported unstated error does nothing to mitigate the damaging impact of the plain language of the opinion.

A. The Record Before The Ninth Circuit Made It Clear That The Monitoring Stations Were In The Los Angeles and San Gabriel Rivers.

There is simply no basis for inferring that the Ninth Circuit was somehow confused about the location of the monitoring stations.

First, as the district court noted in its description of respondents' allegations, the operative complaint specifically alleged that the monitoring stations were within the rivers. (App. 117.)

Second, in describing the location of the monitoring stations, the Ninth Circuit itself cited petitioner's

website, which states that the monitoring stations are within the rivers. (App. 18 n.4.)

Third, plaintiffs readily admitted this fact in opposing summary judgment in the district court. (Petition for Writ of Certiorari at 26 n.4, citing District Court Dkt. 140 at 2.)

Finally, as the United States acknowledges (BFUS at 11), any potential misunderstanding on the part of the Ninth Circuit about the location of the monitoring stations was dispelled by petitioner's petition for rehearing, which specifically noted that the decision was flatly untenable in light of the undisputed fact that the monitoring stations were within the rivers. While the Ninth Circuit amended its opinion in response to other issues raised in the petition for rehearing, it pointedly did not alter the portions holding that discharges under the CWA occurred when water flowed from the "intra-state manmade" constructions of the MS4 at the monitoring stations and into the "naturally occurring Watershed River[s]." (App. 44, 45.) The inescapable conclusion is that the Ninth Circuit was well aware that the record established that the monitoring stations were within the rivers, but that fact was irrelevant to its ultimate, erroneous legal holding concerning a discharge from petitioner's MS4.

Nothing in the record supports the purely speculative proposition that the Ninth Circuit was somehow mistaken about the location of the monitoring stations.

B. The Plain Language And Reasoning Of The Opinion Do Not Support Any Inference That The Court Was Somehow Mistaken As To The Location Of The Monitoring Stations.

Nothing in the opinion suggests that the Ninth Circuit was mistaken about the location of the monitoring stations. The language of the opinion makes it clear that the court based its holding upon its flawed legal analysis of an MS4's status as an "intra-state man-made" construction rendering it distinct from a navigable water for purposes of a discharge under the CWA.

As a threshold matter, nowhere in the opinion does the court suggest that the monitoring stations are anywhere other than within the rivers. This is not surprising since the record – including plaintiffs' admission of facts in response to petitioner's motion for summary judgment – made it clear that the monitoring stations were within the rivers. The opinion does not refer to storm drains or pipes along the banks of the rivers that are inarguably part of an MS4 – it refers only to monitoring stations located in petitioner's "concrete channels" (App. 45, 47), channels which are, based on the record, indisputably within the rivers.

More fundamentally, in holding that there was a discharge under the CWA, the Ninth Circuit expressly found a "discharge" as a matter of fact and law.

(App. 44.) The Ninth Circuit's "fact" is that the monitoring stations were located in portions of the Los Angeles and San Gabriel Rivers maintained by petitioner for flood control purposes. The "law" is that, under the court's view, an MS4 is distinct from a navigable body of water in that "the MS4 is an intra-state man-made construction – not a naturally occurring Watershed River." (App. 44.) If the Ninth Circuit premised its opinion on the mistaken factual assumption that the monitoring stations were in channels not within the rivers, there would be no reason to hold that as a "matter of law," these channels are somehow distinct because as part of an MS4 they are "intra-state" and "man-made construction[s]" distinct from "naturally occurring Watershed River[s]." These terms speak to the legal status of an MS4, not its physical location. There is simply nothing in the opinion to support an inference that the Ninth Circuit was somehow mistaken about the location of the monitoring stations.

C. The Ninth Circuit's Decision Spawns Uncertainty And Inevitable Litigation Based Upon Its Plain Language, Even Assuming Any Rational Inference Could Be Drawn About Some Unstated Factual Error In The Opinion.

Petitioner and its amici are required to plan and fund future projects and evaluate future obligations based upon what cases say, not what they do not say. As noted, nowhere in the opinion does the Ninth

Circuit state that the monitoring stations are anywhere other than in the river channels. In addition, as discussed, the Ninth Circuit made it clear that there is a "discharge under the CWA when waters flow from an MS4 channel that is an "intra-state man-made" structure into "the naturally occurring Watershed River[s]." Neither petitioner nor its amici may be sanguine that administrative agencies and district courts will ignore this plain holding of the Ninth Circuit's opinion. Instead, it is more likely that agencies and district courts, as they are required to do in the Ninth Circuit, will apply the Ninth Circuit's holding as written.

This will cause tremendous confusion. As Justice Scalia noted for the plurality in *Rapanos v. United States,* 547 U.S. 715, 735 (2006), the definitions contained in the Clean Water Act "conceive of 'point sources' and 'navigable waters' as separate and distinct categories." The Ninth Circuit's decision blurs these categories and leaves the regulated community uncertain as to their reach.[1] The reality is that, whatever arguments might be available to public entities in an attempt to forestall reliance on the Ninth Circuit's opinion, the decision spawns needless litigation and unduly complicates planning in light of potential liabilities in the crucial area of municipal flood control. Indeed, the impact on planning is

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[1] Justice Kennedy, in his concurrence in *Rapanos,* identified the Los Angeles River as a navigable water "encased in concrete and steel over a length of some 50 miles." 547 U.S. at 769.

particularly pernicious. The paucity of appellate decisions concerning MS4s means that the Ninth Circuit's ill-considered opinion will inevitably have a singular impact on flood control officials who must necessarily plan and commit massive funding for projects years in advance, and cannot do so based on speculation that at some uncertain point in the future another appellate court might eventually repudiate the Ninth Circuit's decision.

In addition, by suggesting that the improved channels of the Los Angeles and San Gabriel Rivers are somehow separate and distinct from such bodies of water, the Ninth Circuit's opinion calls into question the basic jurisdiction of the EPA and the Army Corps of Engineers over these rivers. Public entities such as petitioner will, as a matter of legal obligation, be required to question that jurisdiction over improved portions of these and other water bodies, since they cannot justify spending, and are not legally authorized to expend, public funds for, under the Ninth Circuit's decision, unnecessary permitting requirements. *See* Cal. Civ. Proc. Code § 526a (authorizing action to bar unnecessary and wasteful expenditure of public funds); *City of Ceres v. City of Modesto*, 274 Cal. App. 2d 545, 555, 79 Cal. Rptr. 168, 173 (1969) ("a court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of lawful power"); *Sundance v. Municipal Court*, 42 Cal. 3d 1101, 1139, 232 Cal. Rptr. 814, 837 (1986) (same).

As it now stands, the Ninth Circuit's opinion invites ongoing, costly litigation, unnecessarily complicates planning in the important area of flood control, and cannot be left uncorrected.

II. THE NINTH CIRCUIT'S OPINION IS NOT BASED ON ANY UNIQUE ASPECTS OF THE PERMIT ISSUED TO PETITIONER.

The United States also suggests that certiorari is not warranted because the case turns upon unique aspects of the specific permit issued to petitioner. (BFUS at 12-13, 15.) Not so.

The Ninth Circuit's opinion does not turn upon any specific language in the permit issued to petitioner. To the contrary, the Ninth Circuit concluded that in order to find that petitioner violated the permit, it was required to find a "discharge" from a "point source" within the meaning of the CWA. (App. 41-42, 45-46.) In fact, the court properly rejected plaintiffs' attempt to avoid this requirement by simply asserting there had been exceedances under the terms of the permit. (App. 41-42.) As the language of the opinion makes clear, the Ninth Circuit found a "discharge" when "stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." (App. 45.) This holding has nothing to do with the terms of the permit.

Thus, the United States' suggestion that renewal of petitioner's permit at some future date might

somehow ameliorate the harmful impact of the Ninth Circuit's opinion (BFUS at 15-16) is incorrect. That monitoring stations may be moved or the permit terms otherwise changed does not alter the holding of the Ninth Circuit that improvements to a navigable water body for flood control purposes transforms that water body into an intra-state man-made construction and thus an MS4 "point source."

The fact that the harmful reasoning and impact of the Ninth Circuit's decision is untethered to any particular terms of petitioner's permit is underscored by the concern expressed by amici from across the country, who, although subject to different permitting requirements, must confront, as a matter of both planning and operating flood control conveyances, the legal issue of whether there is a discharge from an MS4 into a navigable water of the United States when the water body has been improved for flood control purposes. As amicus National Association of Flood and Stormwater Management Agencies observed, "[i]f not reversed, the Ninth Circuit's holding that the river itself is both the point source and the outfall . . . would wreak havoc in the administration of the MS4 permit program nationwide." (Brief of the National Association of Flood and Stormwater Management Agencies at 13; *see also* Brief of Amici The League of California Cities and the California State Association of Counties at 10 ["This issue is of critical importance to the *amici* as most cities and counties in California are covered by an MS4 permit issued under California's discharge permitting program"].)

III. THE UNCERTAINTY CREATED BY THE NINTH CIRCUIT'S OPINION CONCERNING IMPROVEMENTS TO NAVIGABLE WATERS OF THE UNITED STATES REQUIRES RESOLUTION BY THIS COURT.

As noted in the petition and as underscored by amici curiae in support of petitioner, public entities across the country must, for basic flood control purposes, channelize and improve portions of navigable waters of the United States. As Justice Alito noted in another context earlier this year, the "reach of the Clean Water Act is notoriously unclear," and the term "waters of the United States" is in many respects "hopelessly indeterminate." *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring). An opinion that manifestly undermines what little clarity there is with respect to that term and does so in the vital and cost intensive area of basic flood control planning should not be left undisturbed. It is essential that this Court grant review to provide clear guidelines on whether improvements to navigable waters for flood control purposes transform those waters into an MS4 under the CWA.

CONCLUSION

For the foregoing reasons, petitioner submits that the petition for writ of certiorari should be granted.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RULE 29.6 STATEMENT

The disclosures in respondents' brief in opposition remain accurate.

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Respondents file this supplemental brief pursuant to Supreme Court Rule 15.8 to address the Brief for the United States as Amicus Curiae, filed on May 23, 2012.

DISCUSSION

The United States' brief correctly concludes that (1) the court of appeals' decision is consistent with this Court's precedent, (2) any factual misstatement in the opinion is irrelevant to petitioner's liability and is undeserving of this Court's review, and (3) the petition for a writ of certiorari does not raise any issue of national significance. The petition should therefore be denied.

I. The Court Of Appeals' Decision Is Consistent With This Court's Precedent

Respondents agree with the United States that the court of appeals did not base its decision on either of the sweeping legal conclusions attributed to the court by petitioner yet unarticulated in the opinion itself. U.S. Br. 11-12. The court neither ruled that man-made channels are outside the jurisdiction of the Clean Water Act, contrary to *Rapanos v. United States*, 547 U.S. 715 (2006), nor held that the movement of pollutants within a single water body constitutes a discharge under the Act, contrary to *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Should the Court grant the petition for certiorari, respondents would not argue that either of these illusory rulings is correct.

Moreover, the decision could not plausibly be cited for either proposition, and there is therefore no risk

that the opinion will be misapplied by lower courts. First, the court of appeals held that both the Los Angeles River and San Gabriel River are navigable waters, App. 42, despite physical improvements to both rivers. It is far-fetched to suggest that a decision finding liability under the Clean Water Act for pollutant discharges into man-altered rivers stands for the incorrect proposition that man-altered rivers are entirely outside the scope of the Act. U.S. Br. 19.

Second, the court of appeals explicitly held that a liability determination requires proof of a discharge from a point source, App. 41-42, which the court properly defined as "'add[ing]' pollutants from the outside world to navigable water," App. 9 (citation omitted). In stating this well-established rule, the court cited the relevant discussion in *Miccosukee Tribe* that petitioner claims it overlooked, 541 U.S. at 102, to affirm that petitioner's liability depends on proof that it "discharged a pollutant." App. 41. The court further stated that "the primary factual dispute between the parties is whether the evidence shows any *addition* of pollutants by Defendants to the Watershed Rivers." App. 42 (emphasis in original). This dispute would have been irrelevant if petitioner were correct that the court determined "it was not necessary to show that petitioner's MS4 added pollutants to the rivers," in contravention of *Miccosukee Tribe*. Pet. 38-39.

The court of appeals therefore manifestly did not hold petitioner liable for the mere transfer of water within a single water body, U.S. Br. 11-12, and the decision could not be cited for that erroneous principle. Indeed, the decision has been cited to date by other courts only for the opposite and correct rule: that a finding of liability requires proof of a discharge of

pollutants into navigable waters. *Defenders of Wildlife v. Jackson*, No. 10-1915 (RWR), 2012 WL 896141, at *1 (D.D.C. Mar. 18, 2012); *Van Zanten v. City of Olympia*, No. C10-5216-JCC, 2011 WL 5299492, at *6 (W.D. Wash. Nov. 2, 2011).

II. Any Factual Misstatement Had No Bearing On Petitioner's Liability And Does Not Warrant This Court's Review

The United States concludes that, at most, the court of appeals' opinion appears to contain a factual misstatement that did not affect petitioner's liability and is not otherwise important. U.S. Br. 12. Respondents agree.

Any possible factual error relates only to the location of petitioner's outfalls with respect to the monitoring stations. U.S. Br. 18 (referencing the court's "apparent mistake as to the precise locations of the relevant monitoring stations"). The court of appeals correctly held, however, that the exact location of petitioner's outfalls is irrelevant, because the permit relies on representative compliance monitoring and not outfall monitoring to measure liability. App. 37-40, 45; *see also* 40 C.F.R. § 122.26(d)(2)(iii)(D) (compliance monitoring may be conducted at representative locations, including at "instream stations"). Petitioner does not challenge that holding in this Court. Thus, to the extent the court of appeals mischaracterized the particular location of the MS4 outfalls in relation to the monitoring stations, it made no difference to petitioner's liability. U.S. Br. 12.

Furthermore, any mistake of fact does not implicate the questions petitioner presented for review,

notwithstanding petitioner's effort to convert what was at most a factual misstatement into erroneous rulings of law. The court of appeals correctly held that the Los Angeles River and San Gabriel River are navigable waters. App. 42. The court also correctly held, pursuant to *Miccosukee Tribe*, that petitioner's liability must be based on proof that it discharged (or added) pollutants from its MS4 into those navigable waters. App. 9, 41-42. Neither holding depends on where the representative compliance monitoring is conducted.

Petitioner itself does not assert that the court of appeals made a mistake of fact, let alone that any mistake was relevant to the outcome below, and did not present that question to this Court in its petition for certiorari. Pet. i; Pet. Reply Br. 2-3; U.S. Br. 18 n.6. The Court should decline to consider the issue for that reason as well. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992) (the Court will not consider questions outside those presented in the petition for certiorari except "in the most exceptional cases") (citation omitted).

This Court routinely denies review to consider a purported mistake of fact. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); U.S. Br. 15. This is especially so when the lower court properly stated the governing rule of law, as it did here. Sup. Ct. R. 10; U.S. Br. 11-12, 17. There is no reason to depart from that rule in this case.

Finally, the court of appeals' ruling was both correct and equitable. Every Clean Water Act permit

"must include monitoring provisions ensuring that permit conditions are satisfied." App. 39 (citing 33 U.S.C. § 1318(a)(A)); U.S. Br. 4. As emphasized by the United States, petitioner chose the representative monitoring scheme used to assess compliance with its permit and did not challenge its adoption. U.S. Br. 6-7; C.A. FER 31. The results of that compliance monitoring showed uncontested violations of permit limits for fecal bacteria, heavy metals, and other pollutants. U.S. Br. 7; App. 19, 108. And there is no dispute that petitioner discharges these pollutants from its MS4 outfalls into both rivers, both above and below the monitoring stations, and that these outfalls include hundreds of "discernible, confined and discrete conveyance[s], including but not limited to any pipe, ditch, channel, [or] tunnel" within the plain meaning of the Clean Water Act's definition of "point source." 33 U.S.C. § 1362(14); *see also* App. 8-9, 20, 45; C.A. ER 17, 312; U.S. Br. 10. Nothing more is required for liability. App. 9-10.

In sum, to the extent the court's decision includes a factual misstatement, it did not affect petitioner's liability, is not identified in the petition, and does not merit certiorari review.

III. The Petition Does Not Raise Any Issue Of National Significance

The United States' brief properly underscores that the decision below has narrow ramifications because it is tied to the specific terms of petitioner's permit, including its distinctive monitoring scheme. U.S. Br. 12, 15. Neither petitioner nor its *amici* identify a discharger anywhere else in the country that will be

affected by the court of appeals' ruling.[1] U.S. Br. 15. In addition, petitioner's permit is currently being rewritten; the Regional Board announced in January its intent to propose a new permit with a different monitoring program in late Spring 2012.[2] This further weighs against this Court's review. U.S. Br. 15-16.

Petitioner claims that the court of appeals' decision creates confusion for federal agencies, including the Environmental Protection Agency and the Army Corps of Engineers. Pet. 20. But the United States, representing those agencies, rightly rejected this position as based on an "aberrant reading" and a "convoluted chain of reasoning." U.S. Br. 19. There is no confusion for this Court to address.

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[1] To the contrary, *amicus* the Florida Stormwater Association asserts that municipal dischargers in Florida could not be affected by this decision, because Florida state law requires different permit conditions than those at issue here. Fla. Stormwater Ass'n Br. 21.

[2] *See* Memorandum from Samuel Unger, Executive Officer, Los Angeles Regional Water Quality Control Board, to Board Members, Los Angeles Regional Water Quality Control Board, at 8, 12 (Jan. 20, 2012), *available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/la_ms4/MS4%20Memo%20012012.pdf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE 1, 2012

AMICUS CURIAE BRIEF

No. 11-460

In the Supreme Court of the United States

LOS ANGELES FLOOD CONTROL DISTRICT,
PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

This Court granted certiorari limited to Question 2 presented by the petition (Pet. i):

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, whether there can be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

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In the Supreme Court of the United States

No. 11-460

LOS ANGELES FLOOD CONTROL DISTRICT,
PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

The Court granted certiorari on the question whether the flow of water through a channelized portion of a river to a lower portion of the same river can constitute a "discharge of any pollutant" (33 U.S.C. 1311(a)) under the Clean Water Act (CWA or Act). The United States has a substantial interest in the proper resolution of that question, which implicates the National Pollutant Discharge Elimination System (NPDES) permitting program administered by the Environmental Protection Agency (EPA) in conjunction with individual States. 33 U.S.C. 1342. At the Court's invitation, the United States

filed a brief amicus curiae at the petition stage of this case.

STATEMENT

Petitioner operates a municipal separate storm sewer system (MS4) that discharges pollutants into the Los Angeles and San Gabriel Rivers. In CWA Section 402(p)(3), Congress established a unique and flexible scheme for the regulation of MS4 discharges under the NPDES permitting program. 33 U.S.C. 1342(p)(3). Petitioner, along with its co-permittees, applied for and received an NPDES permit for its MS4 discharges.

Respondents subsequently brought suit against petitioner, alleging that petitioner had violated its NPDES permit. The district court granted summary judgment for petitioner. Pet. App. 98-102. The court recognized that monitoring stations located within the two rivers had detected quantities of pollutants in excess of the amounts allowed by the permit. The district court held, however, that respondents had failed to prove that petitioner was responsible for those exceedances. *Ibid.* The court of appeals reversed in pertinent part. *Id.* at 1-50.

A. Statutory And Regulatory Framework

1. a. The CWA establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, CWA Section 301(a) prohibits, except as authorized by the Act, the "discharge of any pollutant," *i.e.*, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12). The term "pollutant" encompasses a variety of materials, including "industrial, municipal, and agricultural waste." 33 U.S.C. 1362(6). The term "navigable waters" means "the wa-

ters of the United States." 33 U.S.C. 1362(7). And the term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any * * * channel * * * , from which pollutants are or may be discharged." 33 U.S.C. 1362(14). That definition "includes within its reach point sources that do not themselves generate pollutants." *South Florida Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (*Miccosukee*).

b. For most discharges of pollutants, as relevant here, regulated entities achieve compliance with the Act by obeying the terms of an NPDES permit issued pursuant to CWA Section 402, 33 U.S.C. 1342. NPDES permits contain "[e]ffluent limitations" that restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" that may be discharged into navigable waters. 33 U.S.C. 1311(e), 1362(11). NPDES permits use effluent limitations in two complementary ways. The first approach is technology based, in which effluent limitations generally reflect the level of pollution control that can be achieved by point sources using various levels of pollution-control technology. 33 U.S.C. 1311, 1314; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-136 (1977). The second approach is water-quality based, whereby effluent limitations are established to meet ambient-based conditions in the water body as specified in the applicable water-quality standards. 33 U.S.C. 1311(b)(1)(C); 40 C.F.R. 122.44(d)(1); see *Arkansas* v. *Oklahoma*, 503 U.S. 91, 104-105 (1992).

Not all point-source-related activities require an NPDES permit. For example, as the Court recognized in *Miccosukee*, *supra*, pumping pollutant-containing water between two parts of the same water body (or

between bodies of water that are not "meaningfully distinct") does not require an NPDES permit because it does not constitute an "addition" of pollutants to navigable waters. 541 U.S. at 109-110, 112; see 33 U.S.C. 1362(12). Federal regulations implementing the CWA further provide that discharges from a "water transfer"—defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—do not require an NPDES permit, whether or not the water bodies in question are distinct from each other. 40 C.F.R. 122.3(i); see 73 Fed. Reg. 33,697, 33,699-33,700 (June 13, 2008) (providing examples of water transfers as well as conveyances within a single water body).[1]

c. Under CWA Section 402(b), state officials may seek EPA authorization to administer the NPDES permitting program with respect to discharges within their States' borders. 33 U.S.C. 1342(b). Since 1974, EPA has authorized the California Water Resources Control Board (State Board) to administer the NPDES program in California. 39 Fed. Reg. 26,061 (July 16, 1974). The State Board, in turn, has delegated that authority to nine Regional Water Quality Control Boards, including the Los Angeles Regional Water Quality Control Board (Regional Board). See *City of Arcadia* v. *State Water Res. Control Bd.*, 119 Cal. Rptr. 3d 232, 240 (Cal. App. 2010). Under California law, a permittee may seek State

[1] Stormwater discharges identified under Section 402(p)(2) and (6), 33 U.S.C. 1342(p)(2) and (6), are not water transfers and remain subject to the NPDES permit program, as reflected in EPA's regulations. See, *e.g.*, 73 Fed. Reg. at 33,705 ("[T]his interpretation regarding water transfers [as not requiring NPDES permits] does not affect EPA's longstanding regulation of [stormwater discharges from MS4s].").

Board review of any provision of an NPDES permit issued by a Regional Board. Cal. Water Code § 13320. The permittee may then appeal the State Board's decision to the California state courts. See *County of L.A.* v. *California State Water Res. Control Bd.*, 50 Cal. Rptr. 3d 619, 621-622, 627 (Cal. App. 2006).

2. MS4s serving populations of 100,000 or more are subject to tailored NPDES permitting requirements under Section 402(p). See 33 U.S.C. 1342(p)(2) and (3). This statutory scheme followed fifteen years of failed attempts to accommodate the unique challenges of regulating MS4 discharges under the CWA.

a. Most municipalities have built infrastructure to collect stormwater and to carry it away from homes, businesses, and roads. That infrastructure is comprised of gutters, storm drains, sewers, and numerous other conveyances that run through (and under) inhabited areas. In any given watershed, those conveyances may cross jurisdictional boundaries and discharge to waters of the United States in dozens, or even hundreds, of different places.

Municipal stormwater discharges pose significant water-quality concerns. Water flowing across roads, parking lots, and other structures often picks up pollutants like heavy metals, pathogens, and toxins from those surfaces. Pet. App. 6. Stormwater containing those pollutants flows into the MS4 and is then discharged through various points from the system to receiving waters. Stormwater discharges have long been recognized as a leading cause of water-quality impairment. See *NRDC* v. *EPA*, 966 F.2d 1292, 1295 (9th Cir. 1992); 55 Fed. Reg. 47,990, 47,991-47,992 (Nov. 16, 1990).

b. In 1973, shortly after passage of the 1972 CWA amendments, EPA promulgated regulations under

which discharges from municipal storm sewers, if comprised entirely of stormwater, were exempt from the NPDES permitting requirements. 38 Fed. Reg. 18,000-18,004 (July 5, 1973) (40 C.F.R. 125.4 (1974)); see *NRDC* v. *EPA*, 966 F.2d at 1295; *NRDC* v. *Costle*, 568 F.2d 1369, 1372 & n.5 (D.C. Cir. 1977). EPA maintained that requiring NPDES permits for MS4s, and certain other classes of point sources exempted by the rule, would make administration of CWA Section 402 unworkable. See *Costle*, 568 F.2d at 1377. In particular, EPA anticipated "an intolerable permit load" due, in part, to "approximately 100,000 separate storm sewer point sources." *Id.* at 1380-1381. The D.C. Circuit invalidated that exemption, however, bringing stormwater discharges within the ambit of Section 402. *Id.* at 1383. As a result, "municipal storm water discharges were subject to the same substantive control requirements as industrial and other types of storm water." *NRDC* v. *EPA*, 966 F.2d at 1308.

In 1987, "[r]ecognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations," Congress amended the CWA to provide a new scheme for regulation of stormwater discharges. *NRDC* v. *EPA*, 966 F.2d at 1296 (footnote omitted); see Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 69 (33 U.S.C. 1342(p)). CWA Section 402(p) authorizes EPA to implement a comprehensive national program for addressing stormwater discharges from MS4s in a manner more flexible than the traditional NPDES permitting program.

Federal regulations implementing Section 402(p) define an MS4 as a publicly owned or operated "conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs,

gutters, ditches, man-made channels, or storm drains) * * * that discharges to waters of the United States." 40 C.F.R. 122.26(b)(8), (18) and (19). An MS4 typically has numerous "outfalls." An "*[o]utfall*" for purposes of the MS4 regulations is "a *point source* as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States." 40 C.F.R. 122.26(b)(9). The term "does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States." *Ibid.* An MS4 is not a single point source; instead, it is best understood as a collection of point sources, including outfalls, that discharge into waters of the United States.

Pursuant to Section 402(p)(2) and its implementing regulations, discharges from MS4s serving populations of 100,000 or more require NPDES permits. 33 U.S.C. 1342(p)(2)(C) and (D); 40 C.F.R. 122.26. Those MS4 permits contain at least two features that distinguish them from other NPDES permits.

First, Section 402(p) allows regulators to ameliorate the harmful effects of stormwater discharges by controlling what enters the system though stormwater management requirements, rather than by imposing traditional effluent limitations requiring end-of-pipe treatment. 33 U.S.C. 1342(p)(3)(B)(iii). The Act mandates that permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of

such pollutants." *Ibid.*; 40 C.F.R. 122.26(d)(2)(iv). MS4 permits therefore may reduce stormwater runoff through provisions such as floodplain management controls, wetland protection measures, best management practices for new subdivisions, and emergency spill response programs. 40 C.F.R. 122.26(d)(1)(v). MS4 permits also may "require strict compliance with state water-quality standards." *Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1166 (9th Cir.), amended, 197 F.3d 1035 (9th Cir. 1999).

Second, the Act expressly authorizes the issuance of stormwater discharge permits on a system-wide or jurisdiction-wide basis. 33 U.S.C. 1342(p)(3)(B)(i) and (iii); 40 C.F.R. 122.26(a)(3)(ii). Several local governments therefore may jointly apply for a single permit to govern interconnected systems discharging into the same waters of the United States. 40 C.F.R. 122.26(a)(3)(ii)-(iv) and (d). This provision eliminates the need to identify and individually permit each point source, a task that may be a practical impossibility in particularly large or complex systems. 55 Fed. Reg. at 48,046. It also relieves permittees of the "potentially unmanageable" burden of providing quantitative data for discharges from each point source, as would be required under traditional NPDES permits. *Ibid.* This flexibility is crucial in easing administration of stormwater permits for both permitting authorities and permittees.

Like other NPDES permits, stormwater discharge permits for MS4s serving populations of 100,000 or more also establish monitoring protocols. Those protocols serve a number of purposes, including assessment of permit compliance. Through its implementing regulations, EPA has developed "a permit scheme where the

collection of representative data is primarily a task that will be accomplished through monitoring programs during the terms of the permit. Permit writers have the necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges." 55 Fed. Reg. at 48,049-48,050. Permit applicants are required to propose a "monitoring program for representative data collection for the term of the permit that describes the location of outfalls or field screening points to be sampled (or the location of instream stations), why the location is representative, the frequency of sampling, parameters to be sampled, and a description of sampling equipment." 40 C.F.R. 122.26(d)(2)(iii)(D). Accordingly, subject to the permitting authority's approval, a permit applicant may choose between a monitoring scheme that samples at outfalls, one that samples from instream locations, or some combination of the two.

3. Under the CWA, "any citizen may commence a civil action on his own behalf against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a). An "effluent standard or limitation" includes any term or condition of an approved NPDES permit. 33 U.S.C. 1365(f)(6). Thus, "[i]n the absence of federal or state enforcement, private citizens may commence civil actions against any person 'alleged to be in violation of' the conditions of either a federal or state NPDES permit." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) (quoting 33 U.S.C. 1365(a)(1)). A successful enforcement action may result in injunctive relief and monetary penalties, 33 U.S.C. 1365(a), but citizens "may seek civil penalties

only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59.

The validity of an NPDES permit cannot be challenged during an enforcement proceeding, including a citizen suit. The Act prohibits "judicial review in any civil or criminal proceeding for enforcement" of "[a]ction[s] of the Administrator with respect to which review could have been obtained under [33 U.S.C. 1369(b)(1)]." 33 U.S.C. 1369(b)(2). One such action is "issuing or denying any [NPDES] permit." 33 U.S.C. 1369(b)(1). The bar against collateral attacks on permits during enforcement proceedings extends to permits issued by States. See *General Motors Corp.* v. *EPA*, 168 F.3d 1377, 1383 (D.C. Cir. 1999).

B. Petitioner's Stormwater Discharge Permit

1. In 1990, petitioner, along with Los Angeles County (County) and 84 cities, applied to the Regional Board and obtained a system-wide MS4 permit. Resp. C.A. E.R. 311, 319 (C.A. E.R.).[2] The permit covers stormwater discharges from a vast MS4 comprised of thousands of miles of storm drains, hundreds of miles of open channels, and hundreds of thousands of connections over a large area of Southern California. Pet. App. 106. Petitioner itself owns, operates, and maintains ap-

[2] The MS4 permit has been modified and reissued over the years, and proceedings for a new permit are currently pending before the Regional Board. Pet. App. 13; see California Reg'l Water Quality Control Bd., L.A. Region, *Tentative Order No. R4-2012-XXXX*, at 13-14 (June 6, 2012) <http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/TENTATIVE LA County MS4 Permit - Order - 6-6-12.pdf>. This brief describes the permit as in effect now and during the period at issue in this case. J.A. 52-254.

proximately 500 miles of open channels and 2800 miles of storm drains—more than all the other co-permittees combined. *Ibid.* The MS4 collects and conveys storm-water runoff from across the County and discharges it into the region's rivers, including the Los Angeles and San Gabriel Rivers, and ultimately into the Pacific Ocean. *Id.* at 8; see California Reg'l Water Quality Control Bd., L.A. Region, *Tentative Order No. R4-2012-XXXX*, Attachment C, Figures C-4 and C-5, http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Attachment C - 6-6-12.pdf (schematic representations of the Los Angeles and San Gabriel Rivers and the thousands of storm drains that discharge into the rivers).

The MS4 permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." J.A. 97; see J.A. 89 ("Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives."); see also Pet. App. 15. The permit contemplates compliance with those standards through, *inter alia*, implementation of the control measures outlined in the permit's stormwater quality management program. J.A. 98. Among the receiving waters protected by the water-quality standards are the Los Angeles and San Gabriel Rivers. J.A. 171, 183; C.A. E.R. 292.

The MS4 permit also establishes a monitoring and reporting program, which was proposed by petitioner and its co-permittees in their application and considered by the Regional Board in developing the permit. J.A. 65-66, 210, 218-221; see 40 C.F.R. 122.26(d)(2)(iii)(D). That program establishes the locations for compliance monitoring at enumerated "mass emissions" stations

downstream of most of the MS4 discharge points, rather than at each outfall. J.A. 219. To determine pollutant levels in the receiving waters to which the MS4 discharges, mass emissions stations collect water samples that are analyzed for certain pollutant constituents. J.A. 219-221. Under the terms of the permit, petitioner, as the Principal Permittee (J.A. 103), is responsible for analyzing the resulting data and submitting a report identifying the possible sources of any exceedances. J.A. 214-221.

Petitioner and respondents have both described the mass emissions stations at issue as being located in the Los Angeles and San Gabriel Rivers.[3] During the proceedings below, the parties sometimes described the same monitoring stations as being located in channelized portions of the MS4 operated by petitioner.[4] That formulation suggested that the pertinent river segments are part of *both* the MS4 itself *and* "the waters of the United States" that the CWA protects. In its brief on the merits, by contrast, petitioner states that certain

[3] See 2:08-cv-01467 Docket entry No. 140, at 2 (C.D. Cal. Sept. 29, 2009); see also Pet. Br. 11 & n.2; Pet. 26 & n.4; Br. in Opp. 6. The County's publicly available sources provide additional information about the location of the monitoring stations at issue. Both stations are located at existing stream gauge stations. See Los Angeles County Dep't of Pub. Works, *Los Angeles County 2006-07 Stormwater Monitoring Report* 2-2, http://www.ladpw.org/wmd/npdes/2006-07_report/Section 2.pdf. The Los Angeles River monitoring station collects samples at a location where the river "is a concrete-lined trapezoidal channel." *Ibid.* The San Gabriel River monitoring station collects samples from a "grouted rock area along the western levee of the river." *Ibid.*

[4] See Pet. App. 18, 107-108; Docket entry No. 89, at 6 (Sept. 8, 2009) (Resp. SUF para. 24); J.A. 338-339; C.A. Reh'g Pet. 2; see also Pet. 24; Br. in Opp. 6.

channelized portions of the Los Angeles and San Gabriel Rivers are not part of the MS4 itself, but are simply receiving waters that take in discharges *from* the MS4. See Pet. Br. 41-42. The proper disposition of this case does not turn on the choice between those characterizations. Rather, the salient point is that the channelized portions of the rivers are "waters of the United States," whether or not they are *also* part of the MS4.[5]

2. In the California courts, petitioner and other co-permittees challenged the MS4 permit on several

[5] The determination whether particular waters are "waters of the United States" is governed by the CWA and applicable regulations. The Los Angeles and San Gabriel Rivers are waters of the United States, and the permit describes them as protected receiving waters. J.A. 171, 183; C.A. E.R. 292. While petitioner operates and maintains channelized portions of those rivers as part of its flood-control infrastructure, neither the channelization of the rivers nor their use within that infrastructure alters their status as waters of the United States. Cf. *S.D. Warren Co.* v. *Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."); 53 Fed. Reg. 49,453 (Dec. 7, 1988) (EPA observes that "[i]n many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.").

So long as the rivers' status as waters of the United States is properly understood, it makes no substantive difference whether channelized portions of the rivers are also viewed as being part of the MS4. Regardless, the relevant pollutant discharges occur when stormwater enters the rivers from petitioner's upstream outfalls, rather than when the water flows past the monitoring stations. See pp. 19-23, *infra*. The determination whether a particular permittee may be held liable for measured pollutant exceedances at a particular monitoring station (see pp. 24-26, *infra*) likewise does not depend on whether the pertinent river segments are viewed as part of the MS4 or not. Characterization of the pertinent river segments as part of the MS4 *would* confuse the analysis, however, if a court erroneously infers from that characterization that the segments are *not* waters of the United States.

grounds. See *County of L.A.*, 50 Cal. Rptr. 3d at 622, 628-636. Petitioner did not dispute, however, that it was discharging pollutants to navigable waters and therefore was required to obtain a permit. Nor did it object to the monitoring requirements, including the location of the monitoring stations. The trial court upheld the permit, and the state appeals court affirmed. *Id.* at 621-622.

C. Procedural History

1. Respondents commenced this action under the CWA's citizen-suit provision. They alleged *inter alia* that petitioner and the County were in violation of the MS4 permit by causing or contributing to exceedances of water-quality standards in the Los Angeles River, San Gabriel River, Santa Clara River, and Malibu Creek, referred to as the "watershed claims" by the courts below. Respondents moved for summary judgment on the Los Angeles River and San Gabriel River claims, and petitioner moved for summary judgment on all four watershed claims. Pet. App. 103-105. The following facts were not disputed: (1) the mass-emissions monitoring data collected by petitioner repeatedly showed exceedances for five different pollutants, *id.* at 108 (citing Resp. SUF paras. 33-37); (2) the mass emissions stations were downstream from where petitioner's and others' storm drains discharged into the Los Angeles and San Gabriel Rivers, *id.* at 116; and (3) the mass emissions stations for the Los Angeles and San Gabriel Rivers are located in channelized sections of the rivers that the parties considered to be part of the MS4,

id. at 107-108; Docket entry No. 140, at 2 (Sept. 29, 2008).[6]

After initially denying both sides' motions for summary judgment (Pet. App. 114-123), and after receiving supplemental briefing, the district court ultimately granted summary judgment for petitioner on all four watershed claims. *Id.* at 98-102. The court recognized that "the mass emissions station data may be the appropriate way to determine whether the MS4 in its entirety is in compliance with the Permit or not." *Id.* at 121. The court found, however, that the monitoring data were "not sufficient to enable the Court to determine that [petitioner] is responsible for 'discharges from the MS4 that cause or contribute to the violation' of standards under Part 2.1 of the Permit, since a co-permittee is responsible 'only for a *discharge* for which it is the operator.'" *Ibid.* (quoting J.A. 93 (Permit para. G.4), 97 (Permit § 2.1)) (emphasis added by district court). The court also determined that other monitoring data showing standards-exceeding pollutants from sampling of petitioner's storm drains, which discharged into the Los Angeles River upstream of the mass emissions stations, were insufficient to establish petitioner's liability because there was no clear indication that the samples were collected at or near an "outflow" rather than in a storm drain or watercourse. *Id.* at 100-101.

2. The court of appeals reversed in relevant part. Pet. App. 1-50.[7]

[6] As noted above (pp. 12-13, *supra*), petitioner no longer considers the channelized sections of the rivers at issue to be part of the MS4.

[7] With respect to respondents' claims of CWA violations in the Santa Clara River and Malibu Creek watersheds, the court of appeals affirmed the district court's grant of summary judgment in petitioner's

The court of appeals stated that resolution of respondents' claims against petitioner and the County "require[d] [the court] to examine whether an exceedance at a mass-emission monitoring station is a Permit violation, and, if so, whether it is beyond dispute that Defendants discharged pollutants that caused or contributed to water-quality exceedances." Pet. App. 25. With respect to the first inquiry, the court of appeals agreed with the district court that, under the terms of the MS4 permit, "an exceedance detected through mass-emissions monitoring is a Permit violation that gives rise to liability for contributing dischargers." *Id.* at 40; see *id.* at 27-40.

With respect to the second inquiry, the court of appeals found the evidence sufficient to establish that petitioner had discharged stormwater that caused or contributed to the permit violations. Pet. App. 40-49. The court stated that the monitoring stations for the Los Angeles and San Gabriel Rivers are located in a portion of the MS4 owned and operated by petitioner; that the monitoring stations had detected pollutants in excess of the amounts authorized by the permit; and that the polluted stormwater was discharged from the MS4 into the rivers. *Id.* at 44-45, 47, 49. The court concluded that "the MS4 is distinct from the two navigable rivers," and that a "discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." *Id.* at 44-45.

favor. Pet. App. 5-6, 47-48. Because respondents did not seek review of that aspect of the court of appeals' judgment, those claims are not before this Court.

3. Petitioner filed a petition for rehearing. Petitioner argued, *inter alia*, that the panel had made a factual error in assuming that the channelized infrastructure in which the mass emissions stations are located is distinct from the Los Angeles and San Gabriel Rivers. See C.A. Reh'g Pet. 3-4. The court of appeals denied the petition. Pet. App. 2.[8]

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that a "discharge of pollutants" occurred in the Los Angeles and San Gabriel Rivers "when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." Pet. App. 45. Petitioner contends that the error is attributable to the court's misunderstanding of the applicable law—and, in particular, to the court's mistaken belief that the flow of polluted water between channelized and unchannelized portions of the same river can constitute a pollutant "discharge." In the government's view, the more likely explanation for the error is that the court misunderstood where the monitoring stations are located in relation to the rivers. In either event, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further proceedings to determine whether petitioner is liable for violating its NPDES permit.

A. 1. In *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), this Court recognized that a "discharge of pollutants" does not occur when water is pumped between "two

[8] At that time, the panel amended its initial opinion, but only to address and reject an unrelated argument raised in the petition for rehearing. Pet. App. 37-38.

hydrologically indistinguishable parts of a single water body." *Id.* at 109. It necessarily follows that no discharge occurs when polluted stormwater that has already been discharged into a river simply flows from a channelized portion (past an instream monitoring station) to a downstream portion of the same river.

2. In petitioner's view, the court of appeals found petitioner liable for permit violations because the court determined, contrary to *Miccosukee*, that a "discharge of pollutants" had occurred when polluted water flowed from channelized portions of the Los Angeles and San Gabriel Rivers into unchannelized segments of those same water bodies. The court of appeals' opinion provides no sound reason for concluding that the court committed such an obvious legal error. Rather, the court seems to have based its decision on a mistaken factual premise: that the monitoring stations were sampling water from a portion of the MS4 that was distinct from the rivers themselves and from which discharges through an outfall to the rivers subsequently occurred. *E.g.*, Pet. App. 44.

B. Although the court of appeals' analysis was faulty, the court's ultimate finding of liability is not necessarily incorrect. Whether petitioner is liable for the pollutant exceedances observed at the instream mass-emission stations depends on analysis of the pertinent record evidence and on the proper construction of petitioner's MS4 permit. In particular, that liability determination may turn on whether, and to what extent, the terms of the permit require a link between the measured exceedances and specific discharges of standards-exceeding pollutants from petitioner's outfalls. That interpretive question, however, is outside the scope of the question on which this Court granted certiorari. It

therefore would be appropriate for this Court to vacate the judgment of the court of appeals and remand the case for further proceedings.

ARGUMENT

FOR PURPOSES OF THE CWA'S PERMITTING REQUIREMENTS, THE FLOW OF STORMWATER FROM ONE CHANNELIZED PORTION OF A RIVER TO A LOWER PORTION OF THE SAME RIVER DOES NOT CONSTITUTE A "DISCHARGE OF ANY POLLUTANT"

This Court granted certiorari on the question whether a CWA "discharge of pollutants" occurs when water flows from a channelized portion of a river into a lower portion of the same river. The Court's decision in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109-112 (2004), makes clear that the answer to that question is "no." Contrary to petitioner's contention, there is no sound reason to believe that the court of appeals misunderstood or misapplied the relevant legal principle recognized in *Miccosukee*. Rather, the court appears to have decided this case on a mistaken factual premise. Regardless of the explanation for the court of appeals' error, however, it would be appropriate to vacate the court's judgment and remand for further proceedings to determine whether petitioner can be held liable for permit violations from MS4 discharges to the Los Angeles and San Gabriel Rivers.

A. The Court Of Appeals Erred In Deeming The Water Flows At Issue To Be Discharges Of Pollutants

1. The flow of water within a single water body, without any intervening use or event, does not constitute a "discharge of any pollutant" within the meaning of the CWA

Under the CWA, a "discharge of a pollutant" is an "addition of a pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12). In *Miccosukee*, this Court recognized that an "addition" of pollutants does not occur when water is pumped between "two hydrologically indistinguishable parts of a single water body." 541 U.S. at 109; see *id.* at 109-112. The Court's opinion indicated that the mere movement of polluted water within a single water body does not constitute a pollutant "discharge" even when the movement results from human intervention (there, the operation of a pump station). See *id.* at 109-112; see also *S.D. Warren Co.* v. *Maine Bd. of Envt'l Prot.*, 547 U.S. 370, 381 (2006) (noting that in *Miccosukee* "the Court accepted the shared view of the parties that if two identified volumes of water are 'simply two parts of the same water body, pumping water from one into the other cannot constitution an "addition" of pollutants'") (quoting 541 U.S. at 109). *A fortiori*, no discharge occurs when water simply flows down a single river.

That principle applies with full force when water flows between channelized and unchannelized portions of the same river. To be sure, there will be cases, such as *Miccosukee* itself, where it is difficult to determine whether a transfer of water involves the same water body or two separate bodies of navigable waters. 541 U.S. at 111. In some such cases, the presence of a con-

crete channel or other human improvement—*e.g.*, one that alters or diverts water flow in a hydrologically significant manner, or one that facilitates the flow of water at a location where no such flow occurred in nature —may be relevant to the question whether a single water body exists. But nothing in the record suggests that is the case here, and there is no warrant for a *per se* rule that lining a pre-existing river segment with concrete inherently transforms a single water body into two.

In this case, the parties agree that the monitoring stations were located within the Los Angeles and San Gabriel Rivers. No party has contended that the river segments where the monitoring stations are located are "meaningfully distinct" from downstream portions of the rivers. Cf. *Miccosukee*, 541 U.S. at 111-112 (explaining that the question whether two allegedly different water bodies are "meaningfully distinct" is a factual issue to be decided by a district court in the first instance). To be sure, pollutant discharges did occur when stormwater flowed into the two rivers from outfalls operated by petitioner and others that are located above the monitoring stations. The subsequent flow of the rivers past the monitoring stations, however, did not constitute a "discharge of any pollutant."

2. The court of appeals' decision appears to reflect a factual misunderstanding rather than an error of law

The court of appeals stated that "[t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations were located, through an outfall, and into the navigable waters." Pet. App. 45. As we explain above, the court erred in concluding that pollutant discharges occurred at the monitoring stations

themselves. Petitioner's attack on the court of appeals' decision assumes that the court accurately understood that the monitoring stations were located within the Los Angeles and San Gabriel Rivers. Based on that assumption, petitioner reads the court's decision to hold, *sub silentio* and in clear contravention of *Miccosukee*, that a pollutant "discharge" occurs when stormwater flows from a channelized portion of a river to a downstream portion of the same river.

A much more likely explanation for the court of appeals' error, however, is that the court mistakenly believed that the monitoring stations at issue were sampling water from a portion of the MS4 distinct from the rivers themselves, *i.e.*, that they sampled from a storm drain, sewer, or other channelized conveyance operated by petitioner that had not yet discharged into the rivers. Several statements in the court's opinion support that inference. See Pet. App. 44 ("[T]he MS4 is distinct from the two navigable rivers."); see also, *e.g.*, *id.* at 5 ("[T]he monitoring stations for the Los Angeles and San Gabriel Rivers are located in a section of ms4 owned and operated by [petitioner], and, after stormwater known to contain standards-exceeding pollutants passes through these monitoring stations, this polluted stormwater is discharged into the two rivers."); *id.* at 18 ("The Los Angeles River and San Gabriel River Monitoring Stations are located in a channelized portion of the MS4 that is owned and operated by [petitioner]."); *id.* at 47 ("[T]he Los Angeles River and San Gabriel River below the mass emissions monitoring stations are bodies of water that are distinct from the MS4 above these monitoring stations."). Indeed, petitioner's own request for rehearing in the court of appeals suggested that the panel had committed precisely that factual error. See

C.A. Reh'g Pet. 2 ("[C]ontrary to the Court's conclusion, [petitioner's] MS4 and the Los Angeles and San Gabriel Rivers downstream from each [mass-emissions monitoring station] are one and the same."); *id.* at 3-4.

This reading of the court of appeals' opinion is bolstered by the court's rationale for holding that petitioner could be held liable for pollutant exceedances in the Los Angeles and San Gabriel Rivers, but not for those in the Santa Clara River and Malibu Creek. The court explained that it could not "mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek" because "it appears that both monitoring stations are located within the rivers themselves." Pet. App. 47. That explanation for distinguishing among the various water bodies would make no sense if the court had understood that the monitoring stations for the Los Angeles and San Gabriel Rivers are *also* "located within the rivers themselves."

Alternatively, the court of appeals' opinion could reflect an assumption that the MS4 is one large point source with one place of discharge into navigable waters. See Pet. App. 44 ("Because the mass-emissions stations * * * are located in a section of the MS4 owned and operated by the District, when pollutants were detected, they had not yet exited the point source into navigable waters."). Such an assumption would also be mistaken. An MS4 is not one large point source but instead is a collection of many (in this case, possibly thousands of) point sources, each of which would require an NPDES permit—generally with individual monitoring requirements—if Section 402(p) had not been added to the CWA to authorize more flexible system-wide and jurisdiction-wide permits. See pp. 5-8, *supra*; *NRDC* v. *Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977).

Regardless of the source of the court of appeals' mistake, the court erred in determining that a "discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways." Pet. App. 45. Because the court of appeals' finding of liability rested on that erroneous premise, the court's judgment should be vacated.

B. The Case Should Be Remanded To Allow The Courts Below To Determine, Based On Their Interpretation Of The MS4 Permit, Whether Petitioner Can Properly Be Held Liable For Pollutant Exceedances In The Los Angeles And San Gabriel Rivers

For the foregoing reasons, the flow of polluted water past the monitoring stations in the Los Angeles and San Gabriel Rivers did not constitute the "discharge of any pollutant" within the meaning of the CWA. It does not necessarily follow, however, that petitioners face no liability in this case. It therefore would be appropriate to remand the case to allow the court of appeals to reconsider its liability determination, free from any misconceptions concerning either the location of the relevant monitoring stations or the relevant legal principle recognized in *Miccosukee*.

The NPDES permit that currently governs petitioner's MS4 prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives." J.A. 97 (Permit § 2.1). Respondents' claims are based (in relevant part) on the theory that petitioner violated its NPDES permit by causing or contributing to exceedances of water-quality standards in the Los Angeles and San Gabriel

Rivers. See Pet. App. 104. Petitioner is unquestionably responsible for numerous pollutant discharges at the many outfalls under its control where stormwater is discharged into those rivers. See Pet. Br. 44 ("Petitioner's pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of 'outfall' and are therefore subject to the Clean Waters Act's proscriptions."). It is undisputed, moreover, that pollutant levels in excess of those allowed by the permit were regularly detected at the mass emissions monitoring stations. See Pet. App. 108 (citing Resp. SUF paras. 33-37).

If (as the court of appeals appeared to believe) the monitoring stations had been located at outfalls subject to petitioner's control, petitioner's liability under the MS4 permit would be difficult to dispute. Under any plausible construction of the permit language, it would then be clear that petitioner's own discharges had "cause[d] or contribute[d] to the violation of Water Quality Standards or water quality objectives." J.A. 97 (Permit § 2.1). It appears, however, that the monitoring stations are instead located in portions of the rivers downstream from many outfalls operated by several different co-permittees, including petitioner. On remand, the court of appeals' liability determination will depend on the court's interpretation of the MS4 permit to identify the precise causal or other connection, if any, the permit requires to be established between elevated pollutant levels and the discharges of a particular permittee.

That question is one of permit construction as to which the CWA does not mandate any particular result. An MS4 permit issued to multiple permittees could validly provide that all permittees (or at least all permittees who have discharged the specific pollutant

involved) will share liability for any measured exceedance of applicable pollutant limits. But such an MS4 permit could also validly provide that only the co-permittee(s) to whose discharges the pollutant exceedance is connected are liable for the permit violation. See 33 U.S.C. 1342(a)(2) ("The Administrator shall prescribe conditions for [NPDES] permits to assure compliance with the requirements of [33 U.S.C. 1342(a)(1)], including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.").

In determining what nexus (if any) between an exceedance and a co-permittee's discharges a particular permit requires, a court should construe the permit by reference to ordinary principles of contract interpretation. See *Piney Run Pres. Ass'n* v. *County Comm'rs*, 268 F.3d 255, 269-270 (4th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Northwest Envtl. Advocates* v. *City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995), cert. denied, 518 U.S. 1018 (1996); *American Canoe Ass'n* v. *District of Columbia Water & Sewer Auth.*, 306 F. Supp. 2d 30, 42 (D.D.C. 2004), appeal dismissed, No. 04-7046, 2004 WL 2091485 (D.C. Cir. Sept. 17, 2004). If the language of the permit, in light of the structure of the permit as a whole, "'is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Piney Run Pres. Ass'n*, 268 F.3d at 270 (citation omitted). If the permit is ambiguous, a court should turn to extrinsic evidence to interpret its terms. *Ibid.* And because the goal "is to determine the intent of the permitting authority," *ibid.*, the interpretation of the permitting authority (here, the State Board) is an important, and often dispositive, type of extrinsic evidence. See *Northwest Envtl. Advocates*, 56 F.3d at 985 (relying on

"significant evidence from [the state environmental agency], the permit author"); *American Canoe Ass'n*, 306 F. Supp. 2d at 46 (relying on an EPA manual advising permitting authorities on the meaning of certain permit provisions).

The interpretive issue described above is well outside the question on which this Court granted certiorari. It therefore would be appropriate for the Court to vacate the judgment of the court of appeals and remand for further proceedings to determine whether petitioner may properly be held liable under the permit for the measured pollutant exceedances.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE ALBUQUERQUE METROPOLITAN ARROYO FLOOD CONTROL AUTHORITY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Albuquerque Metropolitan Arroyo Flood Control Authority (AMAFCA) was created in 1963 by the New Mexico Legislature with specific responsibility for flooding problems in the greater Albuquerque, New Mexico area. N.M. Stat. Ann. § 72-16-1 through § 72-16-103. AMAFCA builds and maintains flood control structures which help alleviate flooding with the purpose of preventing injury or loss of human life and eliminating or minimizing property damage.[2] As a flood control authority, AMAFCA complies and ensures compliance with Federal Emergency Management Association (FEMA) directives,

AMAFCA maintains two main channels, originally constructed by the United States Army Corps of Engineers, that carry flood waters to the Rio Grande. AMAFCA also operates other channels in addition to flood dams and other diversionary structures.

AMAFCA's flood control system does not consolidate flow into one single point of egress. Its channels connect independently into the Rio Grande, up and down both sides of the river. AMAFCA's flood control system is interconnected with storm drainage facilities that are constructed and

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[1] The parties have consented to the filing of this *amicus curiae* brief, and their letters of consent are on file with the Clerk. (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation. (Rule 37.6).

[2] Technical information in this brief has been provided and verified by Jerry M. Lovato, P.E., AMAFCA Executive Engineer.

maintained by Bernalillo County, the Village of Los Ranchos, the University of New Mexico, the City of Albuquerque, the New Mexico Department of Transportation and the City of Rio Rancho. AMAFCA does not generate the waters that come into its system. AMAFCA conveys flows to the Rio Grande through the urban area from other systems that are built and maintained by others.

Some of the flood control channels that AMAFCA constructed or maintains are in pre-existing natural arroyos. In some of these channels, AMAFCA alternates concrete embankments in areas of high-velocity flow with mere monitoring and stabilization of the earthen slopes in segments of the arroyo that experience lower velocity flow.

Because some AMAFCA arroyos existed originally as naturally occurring channels for storm flow, there is a possibility they may be considered "waters of the United States" for the purposes of the Clean Water Act.[3] See 33 U.S.C. § 1362; compare Rapanos v. United States, 547 U.S. 715, 735-36 (2006) (plurality) ("The separate classification of 'ditch[es], channel[s], and conduit[s]'-which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow-shows that these are, by and large, not 'waters of the United States.'") with Rapanos, 547 U.S. at 769-70 (Kennedy, J.) ("The plurality's first requirement-permanent standing water or continuous flow...makes little practical sense in a statute concerned with downstream water quality. The

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[3] AMAFCA does not concede that any of its channels or arroyos are waters of the United States. However, no legal ruling has definitively and specifically resolved the question.

merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on 'waters,' that may not always be true. Areas in the western parts of the Nation provide some examples. The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles. Though this particular waterway might satisfy the plurality's test, it is illustrative of what often-dry watercourses can become when rain waters flow...[T]here is no indication in the dictionary that the 'flood or inundation' definition is limited to poetry...[T]he Corps can reasonably interpret the Act to cover the paths of such impermanent streams." (Citations omitted.)); see also Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) (agreeing that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water").

As with the Los Angeles River channel Justice Kennedy referred to in Rapanos, AMAFCA's system can experience extremely large surges of water during flash flood events. In the arid southwest, runoff events are characterized by short duration, high intensity storms coupled with a highly variable topography that produce velocities from 10 to 40 feet per second. The Albuquerque metropolitan area experiences dangerous flooding conditions

somewhere in the city about six times per year. Albuquerque floods can be particularly hazardous because the origin of the flood may not be obvious at the floodsite itself. Distant thunderstorms in the Sandia Mountains to the east of the city, as well as storms in just one part of the city, can result in an unexpected wall of water which roars through arroyos and channels. Incidents of property damage and personal injury occur every year, but would likely wreak catastrophic property damage and take human life without AMAFCA's flood control structures.

AMAFCA, with three co-permittees, is designated a municipal separate storm sewer system ("MS4") under the Clean Water Act and possesses a National Pollutant Discharge Elimination System ("NPDES") permit from the United States Environmental Protection Agency ("EPA").

AMAFCA has a strong interest in this litigation because of the uncanny parallels between it and the Los Angeles County Flood Control District ("LACFCD"). Like the LACFCD, AMAFCA has a scattered system that is closely intertwined with the systems of other entities; experiences severe flash flood events; and maintains facilities and channels within naturally occurring corridors that conceivably may be classified as waters of the United States. The Ninth Circuit's ruling that flood control structures within waters of the United States are discrete point sources under the Clean Water Act, Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880, 899-900 (9th Cir. 2011), has extreme disruptive potential if applied to AMAFCA.

Since AMAFCA's system depends on flood waters disgorging into the Rio Grande, AMAFCA has real interest in the proper interpretation of the Clean Water Act as applied to MS4s. Like most MS4 flood control authorities, AMAFCA does not and cannot practicably have complete physical control over which waters enter its system. The Ninth Circuit's conclusion that MS4 regulation is indistinguishable from other sources of discharge under the Clean Water Act and that MS4s have a species of strict liability for all discharge that travels through their system is therefore extremely worrisome to AMAFCA.

SUMMARY OF ARGUMENT

MS4s have a grave responsibility to work to prevent the discharge of contaminated stormwater or other run-off into waters of the United States. When MS4s fail to take practicable steps in system design or system management to limit such discharge, or fail to use local zoning ordinances or anti-dumping enforcement as much as reasonably possible to the same purpose, MS4s should rightly be held to account. When MS4s have taken all practicable steps, however, they should not be coerced to either shut down or to adopt measures so financially ruinous or so intrusive into the lives and arrangements of ordinary citizens that the measures could rightly be called impracticable. The Clean Water Act does not require such a result.

AMAFCA contends that it is an erroneous premise that MS4s are invariably strictly responsible for contaminated waters that issue from their systems or segments of their systems. AMAFCA

contends that the Ninth Circuit's conclusion derived from this premise is also erroneous. To the contrary, MS4s are not invariably strictly responsible for contaminated waters that issue from segments of their systems when the system segments are contained within waters of the United States.

In support of these contentions, AMAFCA advances the following arguments:

1. The adoption of the Ninth Circuit's Clean Water Act theory would result in grave consequences for MS4s. AMAFCA, like many other MS4s, is not able to physically control all ingress of contaminated waters into its system without failing in its primary function of preventing or limiting floods. AMAFCA, like many other MS4s, also has no financially or systemically practicable way of sequestering all contaminated flood waters for treatment: AMAFCA's system does not funnel all waters into a unitary collection point and AMAFCA's system relies on discharge of flood waters into waters of the United States to avoid overloading its system capacity.

2. Whereas the Ninth Circuit's theory of the Clean Water Act necessarily implies strict liability for MS4s and stormwater contaminants, the text of the Clean Water Act actually adopts a "maximum extent practicable" standard for MS4 efforts to combat stormwater contamination. Consideration of the purpose and context of the Clean Water Act, along with other tools of textual interpretation, underscore the conclusion that the plain language "maximum extent practicable" standard in 33 U.S.C. § 1342(p)(3)(B)(iii).

3. The Ninth Circuit's theory of the Clean Water Act unnecessarily runs afoul of

commandeering and coercion concerns. Making MS4s strictly liable for contaminated waters that flow through their systems even after the MS4s have taken all practicable steps unduly trespasses on the sovereignty of the states of which the MS4s are subdivisions. The effect would be to coerce the MS4s to take pollution control steps that are impracticable because they are either financially extreme or because they involve extraordinarily intrusive or burdensome local enforcement measures or both. Federal coercion of state action is not consistent with the dual sovereignty inherent in our nation's federalism. These serious constitutional concerns can be avoided by adopting the more textually-tenable "maximum extent practicable" theory of the Clean Water Act's standard for MS4s.

4. Naturally connected hydrologic flow is not additive under the Clean Water Act. The Clean Water Act regulates the "addition" of pollutants. 33 U.S.C. § 1362(12)(A). The word "addition" implies action that brings together items that would not have otherwise been brought together. Maintenance of a flood control segment within a channel does not "add" contaminated water to hydrological system of which the channel is a part when, in the absence of the segment, the contaminated waters would still be part of the hydrological system. Whether an activity or flood control installation is additive can only be established by reference to the conditions that would prevail in the absence of the activity or flood control installation—the mode of reasoning adopted in S. Florida Water Mgmt. Dist. v. Tribe of Indians, 541 U.S. 95, 101 (2004).

ARGUMENT

Three sets of questions arise in this case, either because of the erroneous conclusion reached by the Ninth Circuit, or because of the erroneous chain of reasoning the Ninth Circuit used to reach its conclusion.

Are MS4s strictly liable for all contaminated waters that may flow through their systems or a portion of their systems, regardless of the MS4s lack of culpability for the generation of either the contamination or the water, without respect to the MS4s' inability to wholly prevent its ingress or egress, and notwithstanding the MS4s taking all practicable steps to limit or prevent the flow?

Does the construction, operation, or maintenance of a flood control system segment—a pipe, ditch, channel, tunnel, conduit, or so forth—through which water flows, but which does not alter the natural course of the water (i.e., the segment is not a cause of the water flowing to a water of the United States), therefore always entail that the egress of contaminated waters from the terminus of the flood control segment violates the Clean Water Act?

Does the construction, operation, or maintenance of a flood control system segment— a pipe, ditch, channel, tunnel, conduit, or so forth —in a water of the United States therefore always entail that the egress of contaminated waters from the terminus of the flood control segment violates the Clean Water Act?

The Ninth Circuit answered yes to the third question because it answered yes to the first and, by

implication, the second. The third question is a restatement of the question for which the Court has granted writ of certiorari. It is a subsidiary of the second question, which in turn is a subsidiary of the first.

The Ninth Circuit held that the presence of polluted water in a MS4-maintained channel was *per se* proof of a Clean Water Act violation. The Ninth Circuit first rejected any difference between pollution or contaminants generated by an MS4 or pollution or contaminants already added to the water before entering the MS4. Natural Res. Def. Council, Inc. v. County of Los Angeles, 673 F.3d 880, 900 (9th Cir. 2011). Implicitly, the Ninth Circuit also deemed irrelevant any account of the natural direction of flow absent the flood control segments, since there was no discussion of this point in the opinion. Consequently the Ninth Circuit held that the only determinative factor was the presence of a LACFCD channel segment. Id. At its heart, the Ninth Circuit opinion consists of only two facts—that pollution monitors had detected contaminated waters in a stretch of river channel that were maintained by LACFCD, and that downstream the maintained segment ended—and one conclusion: instant partial summary judgment against LACFCD. Given the Ninth Circuit's premise that an MS4 is immutably liable for any contaminated water that flows from any section of its system, regardless of source, cause, responsibility, or the extent of MS4 efforts to deal with contaminants, the Ninth Circuit's result, as absurd as it might appear at first glance, mechanically followed.

Because these three questions are nested and interdependent, in this *amicus curiae* brief AMAFCA will address considerations that bear on all three.

I. THE ADOPTION OF THE NINTH CIRCUIT'S CLEAN WATER ACT THEORY WOULD RESULT IN GRAVE CONSEQUENCES FOR MS4S.

Petitioner has informed the Court that numerous evils will result from the adoption of the Ninth Circuit's interpretation.

AMAFCA can corroborate Petitioner's fears.

Flood control authorities do not typically generate contaminated run-off in any significant quantity. AMAFCA, like other flood control authority MS4s, does not generally introduce foreign matter into the water that runs down through its systems. Instead, it is the passive recipients of flow generated by other sources in interaction with natural precipitation events.

Flood control and storm drain facilities are designed and must be designed to accept run-off from an entire landscape. Rainfall is not and cannot be designated to fall only at convenient locations. Consequently, unlike conventional sewer systems, MS4s conveyance systems are physically unable to refuse to accept run-off from any particular source. Even if they could, they would then be out of compliance with FEMA guidelines. Flood control authorities do not have the choice to exclude contaminated run-off. MS4s recognize and accept the responsibility to limit contaminated run-off through enforcement, building and construction codes that minimize run-off, and through best

management practices.[4] However, run-off contamination is ultimately an emergent property of the complex and chaotic interactions between thousands of small-scale human decisions and inherently mutable weather systems. Complete control is not humanly possible. Neither teeming human daily activity nor Mother Nature can be adequately predicted, permitted, or planned so as to entirely prevent contaminated run-off or to always limit contaminated run-off to manageable quantities at convenient times in practicable places.

AMAFCA, like other MS4s, can and does take steps to reduce contamination. For example, new construction in the urban area must adopt run-off minimizing features. While AMAFCA cannot retain water without infringing on downstream users water rights, AMAFCA does construct water quality features and structures that help reduce contamination to the extent possible.

However, 100% effect is not humanly possible. AMAFCA is not able to physically wall off its systems from run-off without ceasing to provide the flood control services that are its core function. Other measures, like complete containment for treatment of all run-off that may be contaminated, are not practicable. AMAFCA is simply not capable of holding back waters from the Rio Grande. AMAFCA likely could not design a system to comprehensively hold back and treat flood waters even if AMAFCA were working on a blank slate, but AMAFCA is not working on blank slate. Its

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[4] However, MS4s that are purely flood control authorities often lack legal enforcement authority and must rely on municipal MS4s and other stakeholders.

reasonable expectations that it could continue to operate under its NPDES permit without assuming total liability for any contaminant that enters its system are backed by the last five decades of significant and irrevocable capital investment. AMAFCA provides flood control within an area of 353 square miles in Bernalillo County. AMAFCA owns and maintains 69 miles of channels, both improved and natural, nine miles of underground facilities, and seven miles of dikes and diversion structures. AMAFCA also owns and maintains 35 flood control dams throughout the greater Albuquerque area, and a number of storm water quality facilities. AMAFCA structures protect 671,000 people and $13.7 billion in assets. Hundreds of thousands of citizens residing in the Albuquerque area have committed their lives and their property to the assumption that AMAFCA would be legally capable of providing flood control services. Further, in the arid southwest, even if it were physically possible, retention of rainwaters for extended periods of time would likely violate state law and even international water compacts.

In addition, AMAFCA has designed and constructed its system without regard to the hitherto unknown notion that constructing facilities, e.g., embankments at erosion-prone or flood-prone spots, in a naturally-occurring channel for possible waters of the United States, would create a series of new point sources and discharges under the Clean Water Act. Storm drains and flood control systems such as AMAFCA's often follow the path of pre-existing gullies, arroyos, streams, creeks, and other natural drainage systems. These natural drainage systems are often already sized and located to handle

naturally occurring flows. Further, dwellings, buildings, and human transportation systems are often already sited with respect to natural drainage systems. Converting natural drainage systems to municipal storm sewer system use, to the extent practicable, limits the disruption caused by the system and allows flood waters to dissipate along the path of least resistance. Consequently, if the Ninth Circuit's interpretation were adopted, AMAFCA could find itself responsible for dozens of new point sources without ever having added a drop of contaminant to water.

Flood control authority MS4s like AMAFCA and LACFCD will be deeply harmed if the Ninth Circuit's leaden interpretation of the Clean Water Act makes them strictly liable for third-party contaminated run-off that enters their systems despite their best efforts, that cannot be wholly treated despite their best efforts, and that theoretically would have to be re-impounded and re-treated at every point where flood control facilities alternated with natural channel conditions.

These risks are not hypothetical. In this case, LACFCD faces fines and injunctions not because of any identified failing or culpability or omission with respect to water contamination, but merely because along certain river channels, its facilities exist. In addition, AMAFCA is currently engaged in a dialogue with the EPA regarding a known and specific source of contaminated waterflow into AMAFCA's system that AMAFCA is physically unable to block and over which it lacks legal jurisdiction under New Mexico law, but for which EPA has nonetheless suggested that EPA

enforcement activity may be directed against AMAFCA instead of against the offender. The risks to MS4s of a mechanical interpretation of the Clean Water Act are real. The plight of LACFCD cannot be dismissed as a curiosity with no ramifications outside the parties to this case.

II. WHEREAS THE NINTH CIRCUIT'S THEORY OF THE CLEAN WATER ACT NECESSARILY IMPLIES STRICT LIABILITY FOR MS4S AND STORMWATER CONTAMINANTS, THE TEXT OF THE CLEAN WATER ACT ACTUALLY ENACTS A "MAXIMUM EXTENT PRACTICABLE" STANDARD FOR MS4 EFFORTS TO COMBAT STORMWATER CONTAMINATION.

As applied to flood control authority MS4s, is the Clean Water Act best read as a device to enlist local flood control authorities in a cooperative federalist approach to the problem of polluted run-off, and to make them directly responsible for polluted run-off to the extent that their decisions exacerbate or fail to reasonably mitigate the problem; or is it a device to force blanket responsibility on local authorities? Logic, the purposes of the Act, and the language of the Act and its implementing regulations, show that it is the former. The Clean Water Act is not primarily a device to discourage the construction of or maintenance of channel segments. The Clean Water Act does not impose *per se* liability on flood control authorities regardless of considerations such as the extent to which the MS4 is responsible for contaminated water or has failed to take practical steps to reduce it; regardless of considerations such as the extent to which the flood control authority is

following the natural flow of the watershed such that contaminated water is part of the same hydrologic system it would be in if the flood control authority did not exist; or based on arbitrary distinctions between sections of natural channel that have reached an unspecified quantum of MS4 maintenance and construction and sections that have not.

The skeleton of the Clean Water Act is simple. Except where a permit has been obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. At its heart, the Clean Water Act is not concerned with channels and construction of channeling facilities at all. Pollution is the core concern.

In turn, the phrases "discharge of a pollutant" and "discharge of pollutants" are defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Only at that tertiary step do channel segments make an appearance, in the statutory definition of "point source": "[t]he term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362.

EPA regulations echo these definitions. The EPA defines pollutant discharge as

> (a) Any addition of any "pollutant" or combination of pollutants to "waters of

> the United States" from any "point source...
>
> This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

40 C.F.R. § 122.2.

The evident statutory purpose of the Clean Water Act is to prevent water pollution. Indeed, the Clean Water Act expressly states its purpose: "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Regulation of run-off channels is a *means* to that end.

Interpreting the language of the text in light of its evident textual purpose is an appropriate principle of statutory construction. Hines v. Stein, 298 U.S. 94, 98 (1936) ("The [statutory] purpose . . . is for consideration when the true meaning of statute or rule is sought."). "Statutory language has meaning only in context," Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 545 U.S. 409, 415 (2005), and the evident textual purpose of a statute is a critical piece of that context. It is a "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed

that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Duncan v. Walker, 533 U.S. 167, 174 (2001) (citations and quotation marks omitted). As discussed below, the Ninth Circuit's *per se* interpretation of the Clean Water Act as applied to flood control authority MS4s departs from the Clean Water Act's purpose and, indeed, ignores it.

MS4s were originally not part of the Clean Water Act's statutory framework and are separately addressed in the Clean Water Act. See 33 U.S.C. §1342(p). In that section, Congress made industrial stormwater run-off subject to all normal Clean Water Act permitting requirements under 33 U.S.C. § 1311. 33 U.S.C. § 1342(p)(3)(A) ("Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title."). 33 U.S.C. § 1311 refers to effluent limitations. In contrast, Congress enacted specific requirements for municipal stormwater discharge that did not refer to effluent limitations under section 1311:

> Permits for discharges from municipal storm sewers -
>
> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants *to the maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other

> provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B) (emphasis added). This language, and the meaningful contrast between it and the statutory language applicable to industrial stormwater discharge, should be given effect. See Graham, 545 U.S. at 415.[5] Apparently in recognition of the challenges unique to MS4s, Congress mandated that MS4s act to reduce pollutants "to the maximum extent practicable" but not more. This Congressional directive is inconsistent with the Ninth Circuit's interpretation that any discharge of contaminated water from a flood control channel segment violates the Clean Water Act. What is missing from the Ninth Circuit decision is precisely any attention to the steps LACFCD may have taken to reduce contaminated run-off flow and whether those steps were all that was practicable. By implication, the Clean Water Act acknowledges that some theoretically possible steps may be impracticable, but the Ninth Circuit never addresses what additional steps LACFCD could have taken to

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[5] If the meaningful difference in language for industrial stormwater sources and MS4s is given full effect, arguably there may be instances where industrial sources may have to meet effluent standards whether "practicable" or not. If so, the difference may reflect a Congressional judgment that if worst comes to worst a community can make do without a particular polluting industrial source, but that a community cannot make do without flood control. The difference may also lie in the fact that industrial stormwater sources will likely have generated the contamination in their run-off and that MS4s face control problems that will usually be vastly more complex.

control contaminants, let alone whether those steps were practicable or not.

The maximum practicable reduction in pollution standard is compatible with the Clean Water Act's purpose to clean waters from pollution. In contrast, the Ninth Circuit's interpretation, that makes each transition of contaminated waters from a constructed segment of a channel to a non-constructed segment the point of focus for the Clean Water Act, does not directly address pollution. In a case like AMAFCA's, where certain channels alternate natural segments with constructed segments, the effect of the Ninth Circuit's rule is to make AMAFCA a serial violator for the same amount of flow, arbitrarily adding additional penalties and enforcement not because of any increase in pollution but simply because of the construction of facilities. The practical consequence is to encourage MS4s to lengthen their facilities to cover the whole length of the channels within their jurisdiction, which does nothing to directly reduce pollution. This result is not only orthogonal to the true purpose of the Clean Water Act, it also tends to absurdity. Although the principle of statutory construction that "absurd results are to be avoided," United States v. Turkette, 452 U.S. 576, 580 (1981), is one that must be used with care, it seems clear that Congress did not intend to incentivize mass conversion of the entirety of natural channels into constructed flood control segments, nor did it mean to encourage MS4s to avoid the use of natural channels altogether, nor did it mean to enact the mind-warping principle that a channel that is a water of the United States could pollute itself by discharging water from itself into itself. The Ninth Circuit's opinion necessarily

implies that flow through one channel that contains discrete flood control segments results in multiple violations; this on-again off-again approach to flood controls means that MS4s are penalized for not interfering *more* with the natural channel, which is surely a backwards result. The principle that MS4s should work to reduce pollution to the "maximum extent practicable" is a much less awkward fit with common sense and the statutory purpose, in addition to being part of the actual language of the duly enacted statute.

To the extent there is any ambiguity in the interpretation of the Clean Water Act provisions respecting MS4s, it should be noted that the EPA has adopted regulations that speak in terms of best efforts, not in terms of guaranteed outcomes. 40 C.F.R. § 122.26(d)(2)(i) calls for "*adequate* legal authority" (emphasis added) and elsewhere the EPA has called for a "*strong effort* to have the necessary police powers and controls" necessary to meet statutory standards prior to issuance of the permit. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 48,044 (Nov. 16, 1990 (emphasis added). The EPA has also taken the position that numeric effluent limitations for MS4s are not required by the Clean Water Act and are often impractical because Under Chevron, the Court could properly defer to the implied agency rejection of a rule that MS4s are absolutely liable for contaminants found in waters in their systems. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of

a statutory scheme it is entrusted to administer . . ." (footnote omitted)).

III. THE NINTH CIRCUIT'S THEORY OF THE CLEAN WATER ACT UNNECESSARILY RUNS AFOUL OF COMMANDEERING AND COERCION CONCERNS.

Assume, *arguendo*, that the Clean Water Act does impose a strict liability rule on MS4s, as per the Ninth Circuit's reasoning. The main difference between a "maximum extent practicable" rule and a strict liability rule for all contaminated water is, by definition, the contaminated water that an MS4 cannot practicably control or prevent from discharge. If an MS4 has already adopted all practicable measures to control contaminated water but is still liable for discharge under the Ninth Circuit's theory, what options would it have with respect to flood control?

An MS4 would have three options. First, it could continue to let water discharge from its system in contravention of the Clean Water Act. It would then be subject to citizen suit, a court order to cease discharge on pain of contempt, and liability for costs and attorneys fees. 33 U.S.C. § 1365(a)(1) and (d). It would also be subject to federal civil suit, 33 U.S.C. § 1319(a)(3), and fines that could reach up to $100,000 per day, not to mention the threat of imprisonment for AMAFCA officials, 33 U.S.C. § 1319(c). This option is no option at all.

Second, an MS4 could cease to operate. The result would be instances of flooding that would damage millions of dollars in property and injure or perhaps even kill residents. Because flood control

systems do not themselves generate contaminated run-off and because they often drain along natural drainage patterns, this result would not necessarily reduce actual water pollution. This result would, however, be absolutely unacceptable to the citizens of the State that created the MS4. Not only would their lives and property be at risk in the event of a flood, they would suffer an immediate financial impact through increased flood insurance premiums or even with the denial of flood insurance altogether.

Third, an MS4 could adopt desperation measures that in ordinary circumstances it and most other government entities would reject as impracticable. These could include the unreasonably massive capital costs to create a containment and treatment system capable of handling a 100-year flood; it could include a grant of unreasonably intrusive enforcement powers and unreasonably restrictive regulatory powers from the State, which would presumably be forced to grant them to avoid the alternative of severe flooding and possible loss of life; confiscation of water rights from downstream users, or some combination of the foregoing.[6]

---

[6] AMAFCA here assumes that these impracticable expenses, impracticable enforcement efforts, and impracticable regulations are impracticable because they are unreasonable. If they are impracticable because they are impossible, because even unreasonable measures would not be enough to avoid the discharge of contaminated run-off, then this hypothesized strict liability interpretation of the Clean Water Act would likely fail even the far limits of the constitutional rational basis test, see Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 77 (2001)("Under rational basis scrutiny, the means need only be 'rationally related' to a conceivable and legitimate state end.").

Such a statute would likely fall afoul of the Constitutional and federalist principles of anti-commandeering and anti-coercion.

"It is incontestable that the Constitution established a system of dual sovereignty." Printz v. United States, 521 U.S. 898, 918 (1997). Each state and its subdivisions, and the federal government, have a sphere of independence. "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people-who were, in Hamilton's words, 'the only proper objects of government,' The Federalist No. 15, at 109." Id. at 919-20. When Congress wishes to legislate for the people, it legislates directly. Congress does not use the states as an intermediary. "The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict." Id. at 920. This dualism serves to maintain clear lines of accountability between the elected and the electing. Printz v. United States, 521 U.S. 898, 920 (1997) ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens.").

These principles mean that federal legislation may be unconstitutional if it commandeers the states or state subdivisions to enact particular policies or commandeers state personnel to administer federal schemes.

In 1985, Congress enacted legislation intended to move each state to deal with its particular low level radioactive waste disposal problem, either through entering a regional compact for disposal or creating its own disposal facility. The legislation offered three incentives. First, the legislation surcharged waste exported out of state and returned a portion of the proceeds to states that made measurable progress towards the goal. Second, the legislation penalized out-of-state waste export after certain periods of time. Finally, for recalcitrant states Congress mandated that after 1996 those states would be forced to take title to and assume liability for waste generated within the state boundaries. See New York v. United States, 505 U.S. 144, 151-54 (1992).

The Court approved the first two incentives, as they left the states room to say no. Id. at 168 ("By either of these methods, as by any other permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply."). In contrast,

> The take title provision is of a different character. This third so-called "incentive" offers States, as an alternative to regulating pursuant to Congress' direction, the option of taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly. In this provision, Congress

> has crossed the line distinguishing encouragement from coercion.

Id. at 174-75.

Similarly, in Printz, the Court rejected legislation that directed county sheriffs and other local chief law enforcement officials to complete specified acts in a federal handgun background check scheme, on penalty of possible imprisonment of up to one year. Id. at 521 U.S. 898, 903-04. The Court held that the attempt to direct State personnel violated federalism principles. Id.

NDPES permitting for MS4s includes requirements to enact and enforce ordinances and regulatory measures that minimize contaminated run-off and prohibit dumping in stormwater systems. 33 U.S.C. §1342(p)(3)(B). AMAFCA does not assert that the mere presence in NDPES permitting of requirements for the exercise of an MS4's local authority constitutes commandeering. Unlike the statutory scheme in Printz, where state officials were simply directed to act, the Clean Water Act MS4 scheme is more like the scheme in New York, where Congress is encouraging regulation and the real question is whether Congress' methods have crossed the line from encouragement to coercion. The assertion that the mere existence of local regulatory requirements as one NDPES permit condition violates the commandeering doctrine has been raised and rejected in at least two appellate cases. See Envtl. Def. Ctr., Inc. v. U.S. E.P.A., 344 F.3d 832, 847 (9th Cir. 2003) (holding that the EPA's requirements that small MS4s adopt a regulatory program was not coercive because the MS4s could negotiate an alternative), City of Abilene v. U.S.

E.P.A., 325 F.3d 657, 659-60 (5th Cir. 2003) (holding that the EPA had not "commandeered" an MS4's local governmental authority when the EPA offered a permit that purely measured end-of-pipe effluent as an alternative to implementing stormwater regulatory management programs).

Recent caselaw from this Court offers some guidance as to what constitutes coercion. In Nat'l Fed'n of Indep. Bus. v. Sebelius, __ U.S. __, 132 S. Ct. 2566 (2012), a seven-member majority of the Court held that a Congressional directive that states agree to expand Medicaid coverage or else lose all federal Medicaid funds was unconstitutionally coercive. Id. at 2566-67 (Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting) ("Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional."). Chief Justice Roberts was joined by Justice Breyer and Justice Kagan in rejecting the coercive federal threat of the loss of all Medicaid funds. Id., 132 S. Ct. at 2601-07. In their separate opinion, Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito reached the same conclusion. Id., 132 S. Ct. at 2656-67. In their discussion of coercion the two opinions parallel each other and do not differ in any significant respect (the two opinions do differ on the question of the severability of the Congressional carrot of added funding for expanded Medicaid coverage from the Congressional stick of the threatened loss of all Medicaid funds, compare id. at 2607-08 with id. at 2667-68).

As described by Justice Roberts, the "legitimacy of Congress's exercise of the spending

power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." Id. at 2602. If a state could conceivably turn down the Congressional combination of carrot and stick, Congress has not exceeded its powers. If not, Congress has unconstitutionally coerced the state. Because Congress had conditioned not only the grant of new Medicaid funds on the states' "voluntary" adoption of expanded service, but had threatened to withhold already existing Medicaid funds, Justice Roberts had to agree that threat "serve[d] no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act." Id. at 2603. In effect, the "financial inducement," consisting of some 10% of a state's overall budget, was a "gun to the head." Id. at 2604-05.

NFIB also referred to another test that serves to determine whether a Congressional inducement crosses the line to coercion. "We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" Id. at 2603-04. Although AMAFCA is not aware that the Court has ever applied this test to claims of coercion outside the Spending Clause context, there is no reason in principle that it could not apply in the Commerce Clause context applicable to the present case. For instance, in New York, the Court's approval of Congress' exercise of its Commerce Clause power to surcharge radioactive waste transport across state lines held a reasonable relation to the Congressional concern that most states were burdening a select few

destination states with their indigenous waste problem. In contrast, Congress may not have been able to surcharge *all* transport of any kind of good across state lines merely to incentivize radioactive waste regulation. The latter hypothetical regulation loses the necessary connection to the Congressional purpose for exercising the power and turns into a mere bludgeon.

Based on these coercion and commandeering doctrine principles, a significant argument exists that the Clean Water Act would be coercive if it made MS4s *per se* liable for any contaminated water that exited their systems. The potential penalties that a flood control authority MS4 like AMAFCA would face under the Clean Water Act are more severe than those under the Brady Act that were discussed in Printz. A requirement that an MS4 take responsibility for its waters beyond the maximum extent practicable appears to exceed a necessary connection to the Congressional control over waters of the United States. Assuming that unreasonable but possible regulatory and financial measures exist that an MS4 could take, the MS4 would clearly have no real choice but to take them if the alternative was either destructive and deadly flooding or else fines, court orders, and even potentially jail time. If the MS4 would have no choice, the MS4 would have been coerced. Since the measures are unreasonable, by definition the MS4 would not undertake them unless coerced. Additionally, the possible financial penalties or the efforts needed to avoid them would probably exceed the 10% of the annual budget discussed in NFIB. Finally, the requirement that an MS4 take full and unconditional liability and responsibility for the contaminated storm waters

within its jurisdiction are strikingly similar to the attempt struck down by New York to require states to take title to low-level radioactive waste within their jurisdiction.

"[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." Harris v. United States, 536 U.S. 545, 555 (2002). For this reason, in addition to the textual and statutory bases discussed above, the Ninth Circuit's theory of the Clean Water Act should not be adopted. The Court should make clear that the "maximum extent practicable" language of the Clean Water Act is what applies to MS4s.

IV. NATURALLY CONNECTED HYDROLOGIC FLOW IS NOT ADDITIVE UNDER THE CLEAN WATER ACT.

The Ninth Circuit's view that flow down a channel of water of the United States, into an MS4-maintained segment of the channel, and then onward, constitutes discharge of a pollutant, if the flow is contaminated, is not compatible with the statutory requirement that discharge be additive in nature and is not compatible with this Court's precedent in S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004).

Under the Clean Water Act, the phrases "discharge of a pollutant" and "discharge of pollutants" are defined to mean "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). Webster's defines "addition" as "the result of adding: anything

added: increase: augmentation." Webster's Third New International (3rd ed., 1993). *Addition* of pollutant would be *adding to* or *increasing* the amount of pollution in a water system. Similarly, Black's Law Dictionary (6th ed., 1990), defines "addition" as "implies physical contact, something added to another." All of these definitions imply a counterfactual or a but-for cause in that an increase or connection that would not have otherwise have occurred has occurred as the result of some act.

Miccosukee sheds significant light on the meaning of "addition" in the Clean Water Act. The case concerned a pump that transferred contaminated water from a canal over a levee to a wetland. 541 U.S. at 101 (2004). Although the canal water and the levee water were not physically connected, the Court observed that they may have been hydrologically connected. If they were hydrologically connected, if they were not actually two bodies of water "but instead are two hydrologically indistinguishable parts of a single water body," no permit would be required. Id. at 109-10. As the Court explained:

> The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an "addition" of pollutants. As the Second Circuit put it in [Catskill Mountains Chapter of] Trout Unlimited, Inc. [v. New York,] 273 F.3d 481, 492 (2d Cir. 2001), "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and

> pours it back into the pot, one has not 'added' soup or anything else to the pot."

The Court then went on to suggest a test for determining hydrological connection, by conjuring up the baseline natural hydrological condition absent the activity alleged to function as a point source:

> The District Court certainly was correct to characterize the flow through the S-9 pump station as a nonnatural one, propelled as it is by diesel-fired motors against the pull of gravity. And it also appears true that if S-9 were shut down, the water in the C-11 canal might for a brief time flow *east*, rather than west, as it now does. But the effects of shutting down the pump might extend beyond that. The limited record before us suggests that if S-9 were shut down, the area drained by C-11 would flood quite quickly. *See* 280 F.3d, at 1366 ("Without the operation of the S-9 pump station, the populated western portion of Broward County would flood within days"). That flooding might mean that C-11 would no longer be a "distinct body of navigable water," *id.*, at 1368, but part of a larger water body extending over WCA-3 and the C-11 basin. It also might call into question the Eleventh Circuit's conclusion that S-9 is the cause in fact of phosphorous addition to WCA-3. Nothing in the record suggests that the District Court considered these issues when it granted summary

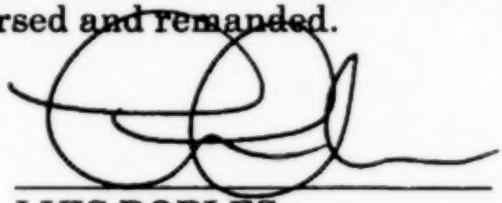
> judgment. Indeed, in ordering later emergency relief from its own injunction against the operation of the S-9 pump station, the court admitted that it had not previously understood that shutting down S-9 would 'literally ope[n] the flood gates.'

S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 111 (2004). Hydrologic systems are dynamic systems. "Addition" cannot be determined by taking a static snapshot at one particular time but with reference to the hydrologic system as a whole and what ultimate difference, if any, the alleged additive activity makes to it. Nothing in the Ninth Circuit's opinion suggests that the Ninth Circuit considered what would happen if LACFCD ceased to operate and maintain its system or even returned the channels containing flood control segments to a wholly natural state. If, as seems likely, water would continue to flow in the channels to the sea, then neither LACFCD nor its system of flood controls have "added" any contaminants to the hydrologic system that is the waters of the United States in the Los Angeles area.

Since the Ninth Circuit simply assumed LACFCD was responsible for flow through its system without considering the null case, AMAFCA suggests that under *Miccosukee* summary judgment against LACFCD was sustained erroneously.

CONCLUSION

For the foregoing reasons, the Ninth Circuit decision should be reversed and remanded.



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AMICUS CURIAE BRIEF

No. 11-460

In The Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* ALEXANDRIA BOEHM, PH.D., AND MARK GOLD, D.ENV. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amicus curiae Alexandria Boehm, Ph.D., is a Professor in Stanford University's Department of Civil and Environmental Engineering and an Affiliated Faculty Member of the Woods Institute for the Environment. Dr. Boehm focuses her research on coastal water quality, with an emphasis on understanding the sources, transformation, transport, and ecology of waterborne pathogens, fecal indicator organisms, and phytoplankton. She has published more than 70 articles on water quality issues, many pertaining to Southern California. She holds a Ph.D. and M.S. in environmental engineering from the University of California, Irvine, and a B.S. in Engineering and Applied Science from the California Institute of Technology.

Amicus curiae Mark Gold, D.Env., is the Associate Director of and Adjunct Professor in the University of California, Los Angeles, Institute of the Environment and Sustainability. Dr. Gold has spent more than 20 years dedicated to studying and improving water quality in the greater Los Angeles area, with an emphasis on coastal protection and water pollution. He first devoted himself to the issue

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[1] Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and respondent have filed a letter of consent with the Clerk of the Court.

as the President of Heal the Bay, and later moved over to his role as a director and professor at the Institute. He holds a B.S. and M.S. in Biology and a Doctorate of Environmental Science and Engineering, all from the University of California, Los Angeles.

SUMMARY OF THE ARGUMENT

Forty years after the enactment of the Clean Water Act, the nation has come a long way in cleaning up its polluted waters. The days of raw sewage and untreated industrial discharges are largely a thing of the past. Gone also are the combustible rivers that prompted the Act's passage in 1972. But a significant and insidious source of water pollution remains – the uncontrolled runoff of contaminated stormwater. Polluted urban runoff, in particular, sickens countless beachgoers each year and threatens the economic and ecological vitality of local communities across the country.

The U.S. Environmental Protection Agency ("EPA") has identified urban stormwater runoff as "a significant threat to water quality across the nation" and "a major cause of water quality impairment." 64 Fed. Reg. 68,722 (Dec. 8, 1999).[4] In promulgating

[4] *See also* U.S. Gov't Accountability Office, GAO-01-679, *Water Quality: Better Data and Evaluation of Urban Runoff Programs Needed to Assess Effectiveness* 37 (2001) [hereinafter "*GAO Report*"].

stormwater regulations in 1999, EPA explained that runoff from land modified by human activities can harm surface water resources by "changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, and elevating pollutant concentration and loadings." *Id.* at 68,723.

As water flows across hardened urban landscapes, it collects and mobilizes myriad contaminants, including disease-inducing bacteria and viruses (pathogens), heavy metals, and other toxins, carrying these pollutants into nearby streams, rivers, lakes, estuaries, wetlands, and oceans. *Id.* at 68,724. Such pollutants "negatively impact receiving waters by changing the physical, biological, and chemical composition of the water, resulting in an unhealthy environment for aquatic organisms, wildlife, and humans." *Id.*

Pathogens, in particular, are a cause of human illnesses associated with urban runoff. Exposure to disease-causing bacteria, viruses, and protozoa in polluted stormwater can cause gastroenteritis and respiratory illness, and in some cases more serious consequences. Although metals and other toxic contaminants carried by stormwater have less immediate impact, they too can be a source of real harm. Ingested by aquatic species or taken up from seafloor sediments, many of these pollutants accumulate in living organisms and work their way up through the food web, where they can adversely affect the health

of ecosystems and pose a threat to fish and seafood consumers.

Nowhere are stormwater pollution concerns more pressing than in Los Angeles County, where a sprawling labyrinth of catchment basins, flood control canals, and storm drains collects urban runoff flowing across more than 3,500 square miles of mostly paved surfaces – roads, driveways, parking lots, rooftops, and the like. Operated by the Los Angeles County Flood Control District (along with the County and eighty-four cities within the County), this storm system is so expansive that a comprehensive map of it does not even exist. Court of Appeals Excerpts of Record ("ER") 312. Throughout California's long dry season and during short winter storm bursts, urban runoff entering the storm system ultimately drains through the San Gabriel and Los Angeles Rivers and through thousands of smaller outfalls to the Pacific Ocean. This drainage system channels untreated pollutants onto public beaches and into the nearshore waters of Santa Monica Bay and Long Beach Harbor, putting millions of recreational users and the coastal ecosystem at risk.

ARGUMENT

I. Urban Stormwater Is a Significant Source of Water Pollution Across the Nation.

Urbanization poses a unique set of water quality problems. Urban development radically alters the natural infiltration capacity of the land, as farms, forests, wetlands, and meadows are converted to impermeable surfaces that have "virtually no ability to absorb storm water." 64 Fed. Reg. at 68,725. Rainfall, snowmelt, and other urban runoff then "wash[es] over these impervious areas, picking up pollutants along the way while gaining speed and volume because of their inability to disperse and filter into the ground." *Id.* EPA studies show that "[w]hat results are storm water flows that are higher in volume, pollutants, and temperature than the flows in less impervious areas, which have more natural vegetation and soil to filter the runoff." *Id.* (citing U.S. EPA, *Urbanization and Streams: Studies of Hydrologic Impact* (1997)).

During the wet season, rain falling on concrete and asphalt collects in storm drains, where it is channeled into receiving waters. In natural landscapes, only about 10 percent of rainfall ultimately makes its way to receiving waters; the rest percolates into the ground or evaporates. By contrast, in heavily urbanized hardscapes like Los Angeles County, more than 50 percent of the water deposited during rain events ends up in downstream surface waters, *GAO Report* at 16, carrying with it "high levels of pollutants" such as "heavy metals, toxic substances, oil

and grease, solvents, nutrients, viruses and bacteria into receiving water bodies."[3] Not surprisingly, "[s]tudies reveal that the level of imperviousness in an area strongly correlates with the quality of the nearby receiving water." 64 Fed. Reg. at 68,725.

Even during the dry season, however, urban runoff is a significant concern. Like stormwater, runoff from manmade sources (such as landscape irrigation and the washing of cars, sidewalks, and driveways) flows into storm drain systems, moving along fertilizers, pesticides, petroleum contaminants, and other harmful pollutants as it flows to receiving water bodies. The higher density of urban environments exacerbates the problem, as "[m]ore people in less space results in a greater concentration of pollutants that can be mobilized by, or disposed into . . . storm sewer systems." *Id.* Ubiquitous urban pollutants like car wastes, litter, and household hazardous wastes only add to the problem because they, too, get washed into storm system drains. *Id.*

One of the most problematic of these human sources of urban runoff is contamination leaking from cracked sanitary sewage systems and septic tanks into storm drain channels. Although storm systems like those in Los Angeles County are not designed to accept or handle pollutants from sanitary sewers,

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[3] U.S. EPA, *Report to Congress on the Phase II Storm Water Regulations*, at I-3 (1999), *available at* http://www.epa.gov/npdes/pubs/ReptoCong_ PhII_ SWR.pdf.

septic tanks, commercial car washes and laundries, or similar sources, illicit discharges from such sources regularly reach storm drains, contributing high levels of heavy metals, toxics, solvents, and fecal contamination. *Id.* at 68,728. In its 1983 *Nationwide Urban Runoff Program* study, for instance, EPA found extremely elevated fecal coliform bacteria counts – sometimes at levels hundreds of times higher than water quality standards – where sanitary sewers were leaking into storm drains. The contaminants in these discharges were "high enough to significantly degrade receiving water quality and threaten aquatic, wildlife, and human health." *Id.*[4]

Compounding the situation in coastal communities, stormwater contaminants that enter the marine environment can persist near shore, largely undiluted, for days or even weeks. As channelized freshwater from a storm system flows into the ocean, it creates a contaminated plume that can penetrate many meters deep and extend as far as six miles offshore.[5] Such plumes can exist for weeks after a storm event, sometimes unmixed with the surrounding seawater due to differences in salinity and

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[4] Close inspection of storm and sanitary sewers in urban areas can reveal that cross connections are not uncommon. Bram Sercu et al., *Storm Drains are Sources of Human Fecal Pollution in Three Urban Southern California Watersheds*, 43 Envtl. Sci. Tech. 293 (2009).

[5] Steven Bay et al., *Study of the Impact of Stormwater Discharge on Santa Monica Bay*, at ES-4 (1999).

temperature.[6] The plume water can be highly turbid, carrying large quantities of suspended particulates like soils, street dust, and litter, as well as chemicals that adhere to them, which eventually settle on the seafloor, where they can adversely affect marine life.[7]

Even after the visible particulates settle out, the contaminants in the plume may remain at levels harmful to human health for days or weeks.[8] For instance, in a study of a Santa Monica Bay stormwater plume originating from the adjacent Ballona Creek watershed, plume water samples showed that initial dilution was not sufficient to reduce the concentration of contaminants below harmful levels.[9] Toxic levels of various contaminants were detected in almost every sample from the plume, and the samples remained toxic even after they were diluted tenfold.[10]

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[6] Kristen M. Reifel et al., *Impacts of Stormwater Runoff in the Southern California Bight: Relationships Among Plume Constituents*, 29 Continental Shelf Res. 1821, 1822 (2009).

[7] *See* Kenneth C. Schiff et al., *Characterization of Stormwater Toxicants from an Urban Watershed to Freshwater and Marine Organisms*, 4 Urban Water 215 (2002).

[8] *Id.* In Santa Monica Bay, for example, a small storm with less than an inch of rainfall generated a large plume that persisted for three days. Steven Bay et al., *Study of the Impact of Stormwater Discharge on Santa Monica Bay*, at ES-5 (1999).

[9] Steven Bay et al., *Study of the Impact of Stormwater Discharge on Santa Monica Bay*, at ES-7 (1999).

[10] *Id.*

The adverse impacts of urbanization on the nation's water quality are real and growing, even as we have significantly reduced pollution from other sources like sewage treatment plants and industrial facilities. Across the country, urbanized land increased by 327 percent between 1945 and 1997, while paved road miles increased by 278 percent. *GAO Report* at 4. In its 1996 *National Water Quality Inventory*, EPA found urban runoff/storm sewers to be a source of pollution in 13 percent of impaired rivers, 21 percent of impaired lakes, ponds, and reservoirs, and 45 percent of impaired estuaries. 64 Fed. Reg. at 68,726; *see also* ER 307 (noting EPA report showing that ocean shoreline impairment due to urban runoff increased from 55 percent in 1996 to 63 percent in 1998). In fact, stormwater runoff now poses the largest single threat to water quality in the United States, acting as "a leading cause of impairment to nearly 40% of the US water bodies that do not meet water quality standards."[11]

II. Stormwater Pollution Poses a Particularly Serious Problem in Los Angeles County.

The stormwater pollution problems associated with urbanization are particularly acute in Southern

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[11] Russell D. Arnone & Joyce Perdek Walling, *Waterborne Pathogens in Urban Watersheds*, 5 J. Water & Health 149, 150 (2007).

California, where demographics, climate, and geography interact to put millions of coastal residents and tourists at elevated risk of illness. Rapid urban development coupled with the episodic nature of local storm events cause "turbid pollutant and pathogen-laden stormwater plumes that are clearly visible nearshore" along the Southern California coast after rainstorms.[12] Scientists working on this issue generally agree that "[u]rban stormwater runoff is a major source of contaminants to [S]outhern California's coastal waters,"[13] and that such contaminants "can negatively impact human and ecosystem health and productivity."[14]

Between 1970 and 2000, the population of the four coastal counties of Southern California doubled, with almost 25 percent of all coastal populations in the United States now living in these communities.[15] Los Angeles has become the second largest city in the

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[12] Nikolay P. Nezlin et al., *Stormwater Runoff Plumes Observed by SeaWiFS Radiometer in the Southern California Bight*, 98 Remote Sensing Env't 494 (2005).

[13] *See, e.g.*, Steven Bay et al., *Water Quality Impacts of Stormwater Discharges to Santa Monica Bay*, 56 Marine Envtl. Res. 205, 205 (2003) (showing "four lines of evidence that the discharge of stormwater from Ballona Creek is a source of impairment to water quality in Santa Monica Bay").

[14] Nikolay P. Nezlin et al., *Stormwater Runoff Plumes Observed by SeaWiFS Radiometer in the Southern California Bight*, 98 Remote Sensing Env't 494 (2005) (citing five other studies reaching this conclusion).

[15] Kenneth C. Schiff et al., *Southern California*, 41 Marine Pollution Bull. 76, 78 (2000).

nation and is part of the thirteenth largest urban area on the planet, which now supports 17 million people – and counting.[16] Predictably, the amount of waste and pollution has soared. Every month, residents of Los Angeles County alone throw 915,000 cigarette butts onto the ground, toss litter from a car window 830,000 times, allow paper or trash to blow away 800,000 times, toss something into a gutter 280,000 times, empty their car ashtrays in the street 40,000 times, wash dirt and leaves into the street with a hose 420,000 times, wash off paintbrushes outside 130,000 times, and spray their yards with pesticides 210,000 times.[17]

This rapid population growth also has been accompanied by dramatic changes in the urban landscape and associated urban runoff. Even on bone dry days, roughly 100 million gallons of contaminated water and debris drain to the ocean, enough to fill the Rose Bowl 1.2 times.[18] On wet days, the volume of discharged stormwater can swell to 10 billion gallons per day.[19] Historically, wetlands served as a natural form of flood control by filtering many pollutants from stormwater before they could reach the ocean. But along the Santa Monica Bay coastline, urban

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[16] *Id.*

[17] State Water Res. Control Bd., Cal. Envtl. Prot. Agency, *Erase the Waste: Storm Water Pollution*, http://www.waterboards.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml (last visited Oct. 31, 2012).

[18] *Id.*

[19] *Id.*

development has destroyed approximately 95 percent of these wetlands.[20] In fact, roughly 83 percent of the landscape in the Ballona Creek watershed, which drains directly to the Bay, is now developed.[21] As a result, more water – and more contaminants in the water – now flow to the coastal waters and beaches where tens of millions of people recreate every year.

Much of this contaminated water drains through the Los Angeles County storm sewer system. Composed of roughly 5,000 miles of drains and open channels, this system carries fully half of all rainwater that reaches the ground to the ocean, much of it within hours of a storm event.[22] This stormwater contributes more than 95 percent of the total runoff volume reaching the coastal zone,[23] adding more metals like chromium, copper, lead, and zinc to coastal waters than all other sources combined.[24]

A broad array of harmful constituents are found in Los Angeles County urban runoff, including pesticides; fertilizers; hydrocarbons; oil; grease; heavy

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[20] Kenneth C. Schiff et al., *Southern California*, 41 Marine Pollution Bull. 76, 78 (2000).

[21] M. Dojiri et al., *Changing Anthropogenic Influence on the Santa Monica Bay Watershed*, 56 Marine Envtl. Res. 1, 9 (2003).

[22] *Id.*

[23] Kristen M. Reifel et al., *Impacts of Stormwater Runoff in the Southern California Bight: Relationships Among Plume Constituents*, 29 Continental Shelf Res. 1821, 1822 (2009).

[24] Kenneth C. Schiff et al., *Southern California*, 41 Marine Pollution Bull. 76, 80 (2000).

metals such as lead, copper, zinc, nickel, and mercury; human and animal feces and their accompanying bacteria and protozoa; viruses of various kinds; synthetic organic compounds; suspended sediments; garbage; and other intermingled substances.[25] In many places, this runoff flows out of storm drains or urban creeks and directly across Southern California beaches before entering the surf zone.

The climate that draws so many to Southern California exacerbates the magnitude of the region's stormwater pollution problem. Los Angeles has a long dry season punctuated by a shorter period of episodic winter storms. During the dry months, contaminants accumulate on the largely impermeable landscape. With the first rains, these pollutants are flushed into the storm system and concentrated in drainage channels flowing to the ocean. 64 Fed. Reg. at 68,724. Adding to this pollution load are sediments that have accumulated during the dry months in the storm drains themselves, which serve as a repository of bacteria and other organisms,[26] toxic chemicals, and even infectious viruses.[27] As a result, although urban

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[25] Kristen M. Reifel et al., *Impacts of Stormwater Runoff in the Southern California Bight: Relationships Among Plume Constituents*, 29 Continental Shelf Res. 1821, 1822 (2009).

[26] Ryan L. Reeves et al., *Scaling and Management of Fecal Indicator Bacteria in Runoff from a Coastal Urban Watershed in Southern California*, 38 Envtl. Sci. Tech. 2637, 2637 (2004).

[27] Adam W. Olivieri et al., Water Environment Research Foundation, *Development of a Protocol for Risk Assessment of Microorganisms in Separate Stormwater Systems* 3-14 (2007).

runoff poses a year-round concern, it is particularly serious during the winter when intermittent storm events flush pollutants through the system.[28]

For instance, more than 99 percent of fecal indicator bacteria[29] detected in urban runoff ditches along the Los Angeles coast is present during or in the immediate aftermath of storm events.[30] Moreover, the quantity and variety of pathogenic bacteria are higher during the rainy months.[31] Altogether, rainwater runoff causes over half of the water quality violations on beaches along Santa Monica Bay even though it rains fewer than 15 days a year.[32] In one study, for instance, over 90 percent of the sites evaluated adjacent to stormwater drains failed to meet bacterial water quality standards after a rain event.[33]

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[28] Rachel T. Noble et al., *Storm Effects on Regional Beach Water Quality Along the Southern California Shoreline*, 1 J. Water & Health 23, 28 (2003).

[29] Fecal indicator bacteria, such as fecal coliform, occur in feces and correlate to illness in swimmers. They serve as a useful proxy for the presence of pathogenic organisms transmitted via the fecal-oral route.

[30] Ryan L. Reeves et al., *Scaling and Management of Fecal Indicator Bacteria in Runoff from a Coastal Urban Watershed in Southern California*, 38 Envtl. Sci. Tech. 2637, 2637 (2004).

[31] Rachel T. Noble et al., *Storm Effects on Regional Beach Water Quality Along the Southern California Shoreline*, 1 J. Water & Health 23, 28 (2003).

[32] *Id.* at 24.

[33] *Id.* at 30.

In granting the 2001 stormwater permit at issue in this case, the California Regional Water Quality Control Board acknowledged that "monitoring indicates that instream indicators (fecal coliform and streptococcus), heavy metals (such as [lead, copper, and zinc]), and pesticides (such as diazinon) exceed state and federal water quality standards." ER 308 (citing *Los Angeles County 1998-1999 Storm Water Monitoring Report*). Subsequent stormwater monitoring data reported since that permit was issued show continued violations of water quality standards for fecal coliform, cyanide, copper, aluminum, zinc, and other contaminants every single year thereafter. ER 358-64. These exceedances are, in many cases, alarming. For instance, during one storm event in October 2005, fecal coliform was detected in the Los Angeles River at 60,000 times the applicable water quality standard and in the San Gabriel River at 40,000 times the standard. ER 360. Nor were these detections anomalous; similar levels were detected in November 2008, ER 364, and somewhat lower but still significant exceedances were reported many times in between those events. The same monitoring data reveal that water quality standards for various metals and other chemical compounds (for example, copper, aluminum, zinc, cyanide, etc.) are being routinely exceeded by 100, 500, or 1,000 percent and sometimes by more. ER 358-64.

III. Urban Stormwater Runoff Poses Significant Risks to Human Health, Especially in Southern California.

A. Exposure to Pathogens Transported by Stormwater Can Cause Serious Human Illnesses.

Millions of people become ill each year from exposure to stormwater. Waterborne infections can result from ingestion, inhalation, or dermal exposure to disease-causing bacteria, viruses, and protozoa. Thus, swimmers, surfers, and others recreating near stormwater outfalls are at increased risk of contracting serious, even occasionally life-threatening, illnesses.

Some types of microorganisms detected in stormwater can be fatal. *Pseudomonas aeruginosa*, for example, is a common but potentially deadly bacterium that can infect any part of the body, especially in individuals who are already weakened by some other illness. These bacteria most commonly attack the respiratory system, urinary tract, gastric system, or injured bones or joints, although ear and eye infections and skin ulcers also are common symptoms of a *Pseudomonas* infection.[34] Sufferers from cystic fibrosis are at particular risk.[35] Infections can

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[34] Adam W. Olivieri et al., Water Environment Research Foundation, *Development of a Protocol for Risk Assessment of Microorganisms in Separate Stormwater Systems* 2-5 to -6 (2007).

[35] Ctrs. for Disease Control & Prevention, *Multi-level Antimicrobial Susceptibility Testing Resources (MASTER)*: Pseudomonas aeruginosa *from Cystic Fibrosis Patients*, http://

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be quite serious, especially in the lungs or heart, where they often prove fatal.[36] Indeed, *Pseudomonas* infections kill roughly half of all people who contract them.[37]

Several viruses detected in stormwater runoff also are potentially lethal. Numerous forms of Enterovirus, a genus of very serious viruses with the potential to cause a range of illnesses, have been found in stormwater. Some enteroviruses can cause a variety of life-threatening conditions, including aseptic meningitis,[38] paralysis, and myocarditis,[39] while others cause symptoms like gastroenteritis, discussed below.[40] Troublingly, "enteroviruses . . . can spread to various organs and persist in the body for years – potentially causing disease long after the initial infection."[41]

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wwwn.cdc.gov/dls/master/select_documents.aspx?type=1&cat=19 (last visited Oct. 31, 2012).

[36] Adam W. Olivieri et al., Water Environment Research Foundation, *Development of a Protocol for Risk Assessment of Microorganisms in Separate Stormwater Systems* 2-5 to -6 (2007).

[37] *Id.*

[38] Nino Khetsuriani et al., Ctrs. for Disease Control & Prevention, *Enterovirus Surveillance – United States, 1970-2005*, Mortality & Morbidity Weekly Rep., Sept. 15, 2006, at 1, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/Ss5508a1.htm.

[39] *Id.*

[40] *Id.*

[41] Enterovirus Foundation, *About EV*, http://www.enterovirusfoundation.org/aboutev_mid.shtml (last visited Oct. 31, 2012).

The Hepatitis A virus also can be carried in stormwater. This virus infects the liver, manifesting after a gestation period of several weeks. Symptoms include fever, fatigue, loss of appetite, nausea, vomiting, abdominal pain, dark urine, clay-colored bowel movements, joint pain, and jaundice.[42] The effects linger for months, and while most sufferers eventually make a full recovery, a small percentage suffer liver failure and die.[43]

While the risks of contracting these serious illnesses from stormwater are real, by far the most common symptoms for people exposed to contaminated runoff are gastroenteritis and respiratory illness. When someone contracts gastroenteritis, she will face a number of unpleasant symptoms ranging from vomiting and diarrhea to extreme dehydration. Most people become ill a few days after exposure,[44] although the onset can be several weeks later for those whose symptoms are caused by protozoa like *Giardia lamblia*.[45] Initial symptoms like stomach

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[42] *Id.*

[43] Ctrs. for Disease Control & Prevention, *Hepatitis A Information for the Public*, http://www.cdc.gov/hepatitis/a/afaq.htm (last visited Oct. 31, 2012).

[44] A recent study in Orange County found a "strong peak" in gastroenteritis symptoms manifesting two days after exposure. John M. Colford Jr. et al., *Using Rapid Indicators for Enterococcus to Assess the Risk of Illness After Exposure to Urban Runoff Contaminated Marine Water*, 46 Water Res. 2176, 2183 (2012).

[45] Ctrs. for Disease Control & Prevention, *Parasites – Giardia*, http://www.cdc.gov/parasites/giardia/gen_info/faqs.html (last visited Oct. 31, 2012).

cramping and fever grow into nausea and eventually vomiting and diarrhea. In more intense cases, loss of fluids can lead to dehydration and weight loss, requiring hospitalization.[46]

These symptoms can last for anywhere from several days to several months, depending on the cause of the infection. In *Giardia* infections, for example, symptoms can remain for over six weeks.[47] In some cases, gastrointestinal problems persist long after the parasites have been expurgated from a patient's system.[48] *Cryptosporidium* infections typically run their course in two to four weeks, but sometimes lead to more serious symptoms, like cholecystitis, an inflammation of the gallbladder that if left untreated can cause organ rupture.[49] Other forms of gastroenteritis, such as those caused by rotaviruses and adenoviruses, last for a comparatively brief three to

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[46] *See, e.g.*, *id.*; Ctrs. for Disease Control & Prevention, *National Center for Emerging and Zoonotic Infectious Diseases: Salmonellosis*, http://www.cdc.gov/nczved/divisions/dfbmd/diseases/salmonellosis/ (last visited Oct. 31, 2012).

[47] Ctrs. for Disease Control & Prevention, *Parasites – Giardia*, http://www.cdc.gov/parasites/giardia/gen_info/faqs.html (last visited Oct. 31, 2012).

[48] Mayo Clinic, Giardia *Infection* (*Giardiasis*), http://www.mayoclinic.com/health/giardia-infection/DS00739 (last visited Oct. 31, 2012).

[49] Mayo Clinic, *Cholecystitis*, http://www.mayoclinic.com/health/cholecystitis/DS01153 (last visited Oct. 31, 2012).

nine days.[50] Adenoviruses, however, can come with an array of other symptoms, such as sore throat, bronchitis, pneumonia, pink eye, bladder infection, and neurologic disease.[51] Rotaviruses are the most common cause of severe gastroenteritis in young children,[52] and adenoviruses also target children with weakened immune systems.

A variety of bacteria found in stormwater can also cause gastroenteritis. The best known of these microbial culprits is *Salmonella*, which does not confine itself to poorly-cooked food, as most people imagine. Many of the 1,700 subspecies[53] of *Salmonella* have been found in stormwater, a consequence of dissolved pet feces and leaking sewers that leach into urban runoff. People who contract *Salmonella* poisoning become violently ill, with gastroenteritis so severe that hospitalization is often necessary. Several other species of stormwater bacteria can produce similar symptoms, including *Clostridium perfringens*, which

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[50] Ctrs. for Disease Control & Prevention, *Adenoviruses*, http://www.cdc.gov/adenovirus/about/symptoms.html (last visited Oct. 31, 2012).

[51] *Id.*

[52] Umesh D. Parashar et al., Ctrs. for Disease Control & Prevention, *Prevention of Rotavirus Gastroenteritis Among Infants and Children: Recommendations for the Advisory Committee on Immunization Practices (ACIP)*, Mortality & Morbidity Weekly Rep., Aug. 11, 2006 at 1, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5512a1.htm.

[53] Russell D. Arnone & Joyce Perdek Walling, *Waterborne Pathogens in Urban Watersheds*, 5 J. Water & Health 149, 154 (2007).

can establish colonies in a human intestinal tract, producing a toxin that leads to gastroenteritis,[54] and several subspecies of *Shigella*, which can cause shigellosis, also known as bacillary dysentery, a serious form of gastroenteritis characterized by blood in the stool.[55]

Other kinds of infection are also possible. *Staphylococcus aureus* causes a common bacterial infection, resulting in pus-filled skin abscesses or cellulitis, "an infection of the underlying layers of the skin."[56] Such infections are among the most common in the United States, and they can be extremely painful. In rare cases, moreover, *Staphylococcus* bacteria can lead to serious bloodstream infections, pneumonia, or bone and joint infections.[57]

In short, bacteria, viruses, and protozoa found in stormwater can have potentially debilitating consequences for human health and frequently result in days or weeks of illness and discomfort. Such diseases can exact a substantial economic, as well as human,

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[54] Ill. Dep't of Pub. Health, *Clostridium Perfringens*, http://www.idph.state.il.us/Bioterrorism/factsheets/Clostridium.htm (last visited Oct. 31, 2012).

[55] Russell D. Arnone & Joyce Perdek Walling, *Waterborne Pathogens in Urban Watersheds*, 5 J. Water & Health 149, 154 (2007).

[56] Minn. Dep't of Health, *Causes and Symptoms of* Staphylococcus Aureus, http://health.state.mn.us/divs/idepc/diseases/staph/basics.html (last visited Oct. 31, 2012).

[57] *Id.*

toll, as a result of costly hospital visits and missed work days.

B. Recreational Users Near Stormwater Outfalls in Los Angeles County Are at Significant Risk of Disease.

Every year, tens of millions of Southern California beachgoers unknowingly put themselves at risk for these serious illnesses by playing or swimming near a storm drain outlet, of which there are thousands. A 1999 epidemiologic study conducted by Robert Haile and over a dozen other researchers analyzed the health impacts of swimming at three Santa Monica Bay beaches with stormwater outfalls. The study demonstrated increased risk of disease symptoms for those who swam close to a stormwater outlet, and especially for those who submerged their heads.[58] In particular, the researchers observed "increases in risk for fever, chills, ear discharge, coughing and phlegm, [Highly Credible Gastrointestinal Illness 2], and [Significant Respiratory Disease]," as well as smaller increases in risk for "eye discharge, earache, sore throat, infected cut, and [Highly Credible Gastrointestinal Illness 1]."[59]

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[58] Robert W. Haile et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, 10 Epidemiology 355, 355-57 (1999).

[59] *Id.* Highly Credible Gastrointestinal Illness 1 is defined as gastroenteritis in which subjects "experienced at least one of the following: (1) vomiting, (2) diarrhea and fever, or (3) stomach

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In the Haile study, people who swam close to a stormwater outlet were far more likely to exhibit symptoms than those who swam at least 400 meters away. Those swimming near the outlet had a 1 in 12 chance of contracting a significant respiratory disease and a 1 in 14 chance of contracting a fever; the risk dropped by 50 percent for those swimming further away.[60] For almost every symptom measured, the probability increased with swimmer proximity to the outfall, dramatically demonstrating the causal link between stormwater exposure and illness.[61]

The Haile study results are consistent with the consensus of other studies analyzing the health impacts of swimming in waters contaminated with bacteria and other pathogens. For example, one very recent study found that "swimmers at Doheny Beach [in Orange County] in the summers of 2007 and 2008 experienced diarrhea at a significantly increased rate compared to non-swimmers," as well as "increased rates of eye infections and earaches

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pain and fever." Highly Credible Gastrointestinal Illness 2 is defined as gastroenteritis evincing vomiting and fever. Significant Respiratory Disease is defined as respiratory disease exhibiting "one of the following: (1) fever and nasal congestion, (2) fever and sore throat, or (3) coughing with phlegm." *Id.*

[60] *Id.*; *GAO Report* at 24.

[61] Had the study evaluated non-swimmers as a control group, the results may well have been even more dramatic.

among swimmers."[62] Aggregating findings of studies from around the world, Annette Prüss found a "dose-related increase of health risk in swimmers with an increase in the indicator-bacteria count in recreational waters," confirming that people swimming closer to higher concentrations of stormwater pathogens have a higher risk of becoming ill.[63] Of the 22 studies that Prüss analyzed, 19 found a positive correlation between swimming in recreational waters and elevated risk of illness, particularly gastrointestinal illness.[64] Unsurprisingly, studies that assess data by age of subject show that children are the most vulnerable to waterborne illness from swimming.[65]

As one might expect, moreover, the stronger the outflow from a stormwater drain, with its associated pathogens and other pollutants, the greater the probability that swimmers will become ill.[66] The Prüss

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[62] John M. Colford Jr. et al., *Using Rapid Indicators for Enterococcus to Assess the Risk of Illness After Exposure to Urban Runoff Contaminated Marine Water*, 46 Water Res. 2176, 2183 (2012).

[63] Annette Prüss, *Review of Epidemiological Studies on Health Effects from Exposure to Recreational Water*, 27 Int'l J. Epidemiology 1, 1, 3-4 (1998).

[64] *Id.* at 3

[65] *Id.* at 8.

[66] *Id.* at 3; *see also* John M. Colford Jr. et al., *Using Rapid Indicators for Enterococcus to Assess the Risk of Illness After Exposure to Urban Runoff Contaminated Marine Water*, 46 Water Res. 2176, 2183 (2012) (finding "an increasing dose-response relationship" with "the strongest associations . . . seen for those who reported swallowing water, especially on berm-open days").

study found that higher concentrations of bacteria were correlated with higher rates of illness.[67] This means that low-level runoff, which is essentially constant in Los Angeles County, will lead to some sustained increase in illness, while the most severe risk will occur in the days following major rain events.

These studies demonstrate why urban runoff poses such a serious public health problem for Southern California, where residents and visitors alike intensively use beaches and coastal waters throughout the year. People are drawn to the coast for a variety of reasons, including beach recreation, swimming and surfing, pleasure boating and windsailing, commercial and sport fishing, and aesthetic enjoyment, among others. There are between 150 and 400 million distinct beach visits in the state each year,[68] the vast majority of which occur in Southern California. In fact, more than 60 percent of all beach visits in the United States occur on Southern California's 220-mile coastline.[69] Beaches along Santa Monica Bay

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[67] Annette Prüss, *Review of Epidemiological Studies on Health Effects from Exposure to Recreational Water*, 27 Int'l J. Epidemiology 1, 3 (1998).

[68] Linwood Pendleton & Judith Kildow, *The Non-Market Value of California Beaches*, 74 Shore & Beach 34, 34-37 (2006).

[69] Ryan H. Dwight et al., *Influence of Variable Precipitation on Coastal Water Quality in Southern California*, 83 Water Env't Res. 2121, 2121 (2011).

alone experience 50 to 60 million beach visits each year.[70]

And unlike other areas of the country, the mild Southern California winters mean that ocean recreation continues year-round. Hundreds of thousands of people frequent the beaches on the many sunny days that Los Angeles experiences during the winter months, but even on stormy days, surfers flock to the water hoping to catch better waves.[71]

Stormwater-related coastal contamination not only causes human illness in exposed individuals, it also results in lost recreational and economic opportunities among those who do not get sick. In 2000, ocean-dependent activities generated approximately $9 billion for the local economies of coastal communities in Southern California.[72] Yet this economic activity is impacted by coastal pollution because beach closures due to suspected pathogen contamination are routine. In 2004, for example, local health officials in Los Angeles and Orange Counties ordered 2,408 beach closures across the 28 individual beaches

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[70] Robert W. Haile et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, 10 Epidemiology 355, 355 (1999).

[71] Jong Ho Ahn et al., *Coastal Water Quality Impact of Stormwater Runoff from an Urban Watershed in Southern California*, 39 Envtl. Sci. & Tech. 5940 (2005).

[72] Steven Bay et al., *Water Quality Impacts of Stormwater Discharges to Santa Monica Bay*, 56 Marine Envtl. Res. 205, 206 (2003).

within their collective jurisdiction.[73] Thus, on average, each beach was closed to visitors for 86 days, or nearly one-quarter of the year. This closure pattern is representative of other years.

Still, these precautions have proved insufficient to protect human health. Studies indicate that each year, people contract between 627,800 and 1,479,200 additional cases of gastrointestinal illness above the societal baseline at beaches in Los Angeles and Orange Counties, resulting in economic costs of between $21 and $51 million (in year 2000 dollars) in medical treatment and lost time on the job.[74]

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[73] Suzan Given, Linwood H. Pendleton & Alexandria B. Boehm, *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, 40 Envtl. Sci. & Tech. 4851, 4851 (2006).

[74] *Id.* In 2012 dollars, this total is actually between $28 and $69 million, although the underlying structural changes to the area – continued urbanization and thus increased levels of stormwater and associated contaminants, as well as higher population to become ill – may only have raised the number further. This total, moreover, measures only the economic costs of increased instances of gastrointestinal illness and does not account for the numerous other diseases that people can contract, or the other economic losses suffered by local businesses or fishermen. Thus, the annual total cost of contaminated coastal waters may actually be far higher.

IV. Heavy Metals and Other Contaminants Found in Stormwater May Have Long-Term Ecological Impacts.

Beyond the pathogens that can immediately sicken exposed beachgoers, stormwater routinely contains other contaminants that may pose long term risks to human health and the environment. Through processes known as bioaccumulation and biomagnification, heavy metals and other toxic substances[75] ingested by fish, mollusks, crustaceans, and other organisms can be converted to a chemical state that is easier for humans to absorb; in this state, contaminants can become concentrated in the higher trophic level species that humans are more likely to consume. Many fish species that bioaccumulate metals, like the California Halibut, are among the most popular species for fishermen to catch.[76]

Most troubling from an ecological perspective, heavy metals and excess sediment carried with stormwater plumes can adversely alter the marine environment. As a stormwater plume dissipates, contaminants not taken up by marine organisms in the

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[75] While legacy contaminants such as the pesticide DDT and polychlorinated biphenyls (organochlorine chemicals once used in the production of electrical equipment) may also accumulate in marine organisms, today they generally are not a significant component of stormwater discharge in highly urbanized areas.

[76] Santa Monica Bay Restoration Comm'n, *State of the Bay: Analysis of the Environmental Conditions of Santa Monica Bay* 22 (2010).

water column can settle on the seafloor. Contaminated seafloor sediments can then become an ongoing source of toxicity if they are stirred up in the water column, redistributed across the seafloor, or ingested by marine organisms and enter the food chain.[77]

Organisms lower on the food chain are most susceptible to contamination by toxic metals because they tend to be smaller and less complex. Plankton, for example, are unable to avoid a stormwater plume (because they move with the currents) and are more sensitive than other marine species to pollutants, making them vulnerable to adverse effects from contaminated runoff.[78] Given the fundamental role of plankton at the base of the food chain – they are essential to the survival of various fish, sea urchin, clam and shrimp species – changes in plankton populations due to stormwater toxicity can diminish the viability of other marine species, as pollution effects ripple through the ecosystem.[79]

Although studies of urban runoff impacts on aquatic species are rare, there is good reason to believe that species other than plankton also are adversely affected by the deposition of stormwater

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[77] *See* Steven Bay et al., *Study of the Impact of Stormwater Discharge on Santa Monica Bay*, at ES-22 (1999); Kenneth C. Schiff et al., *Southern California*, 41 Marine Pollution Bull. 76, 80 (2000).

[78] Steven Bay et al., *Study of the Impact of Stormwater Discharge on Santa Monica Bay*, at ES-6 (1999).

[79] *Id.*

pollutants in freshwater or marine sediments. Bottom-dwelling (or benthic) organisms are often largely immobile and rely on the sediment as both a home and food source. Accumulated toxins that precipitate out of urban runoff over the course of several storms, or even several seasons, may bioaccumulate in the flesh of benthic invertebrates and flatfish. Scientists have found, for example, that sea urchins are particularly susceptible to adverse reproductive effects from exposure to metals in stormwater, and other freshwater organisms exhibit sensitivity to contaminants such as organophosphate pesticides.[80]

Stormwater runoff from urban areas is one of the most significant sources of metals in Southern California coastal water, including chromium, copper, nickel, lead, and zinc. This runoff contributes approximately 520 metric tons of metals to Southern California's mainland coastal shelf each year.[81] Sediments tested near stormwater outfalls in Santa Monica Bay discharge points were twice as contaminated with chromium, copper, and lead as sediments from areas that did not receive large amounts of runoff and were

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[80] Kenneth C. Schiff et al., *Characterization of Stormwater Toxicants from an Urban Watershed to Freshwater and Marine Organisms*, 4 Urban Water 215, 215 (2002).

[81] Kenneth C. Schiff, *Sediment Chemistry on the Mainland Shelf of the Southern California Bight*, 40 Marine Pollution Bull. 268, 275 (2000).

50 percent finer than sediments outside of these discharge areas.[82]

The toxic sediments carried to the ocean with stormwater can also significantly alter nearshore habitat, to the detriment of native species. Substantial deposits of fine-grained toxic sediments can cause environmental damage in a variety of ways, including smothering bottom-dwelling organisms, causing irritations of fish gills, reducing the visual clarity of the water, warming the water with consequent decreases in oxygen levels, and reducing the amount of light available for photosynthesis.[83]

While more work needs to be done to fully understand the impacts of polluted stormwater on marine and freshwater ecosystems, the influx of contaminants and the levels of discharge strongly suggest that urban runoff has detrimental effects on the aquatic environment as well as public health.

CONCLUSION

Urban stormwater runoff is the source of significant human illness, particularly along the Southern California coastline, where millions of people live,

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[82] *Id.* at 274.

[83] Kristen M. Reifel et al., *Impacts of Stormwater Runoff in the Southern California Bight: Relationships Among Plume Constituents*, 29 Continental Shelf Res. 1821, 1822 (2009).

work, and play. With vast reductions in water pollution loading from traditional sources (like sewage treatment plants and industrial operations) during the past two decades, contaminated stormwater remains the last and most significant uncontrolled source of water quality impairment in populated urban areas. In Los Angeles County, where high levels of pathogens, heavy metals, pesticides, and other chemical compounds are flushed through the storm drain system, untreated discharges to Pacific Ocean beaches and coastal waters adversely affect human, economic, and ecological health. These effects are likely to grow worse as urbanization and the local population continue to grow. Accordingly, the Court should affirm the decision below and allow Respondents to enforce the terms of the stormwater permit at issue in this case.

Respectfully submitted,

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November 5, 2012

AMICUS CURIAE BRIEF

SUPREME COURT
FILED
NOV 5 - 2012
OFFICE

No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
AND SANTA MONICA BAYKEEPER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR DEREK B. BOOTH, PH.D., P.E., R.P.G. ON THE STORMWATER COLLECTION PROCESS AND THE FUNCTION OF STORM SEWER SYSTEMS IN SUPPORT OF RESPONDENTS

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FIGURES

Figure 1. Relationship Between Imperviousness, Drainage Density, and Runoff. COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT'L RESEARCH COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 156 (2009), *available at* http://www.nap.edu/catalog/12465.html. 3

Figure 2. Curb inlet, St. Louis, Mo. *Original photo.* 5

Figure 3. Grate inlet, St. Louis, Mo. *Original photo.* 5

Figure 4. Outfall, Fishpot Creek, St. Louis Cty., Mo. Used with permission from Kathleen Logan Smith, Mo. Coalition for the Env't. 7

Figure 5. Concrete Outfall, Fishpot Creek, St. Louis Cty., Mo. Used with permission from Kathleen Logan Smith, Mo. Coalition for the Env't. 7

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Dr. Derek B. Booth is an internationally recognized geologist in the field of urban watersheds and stormwater management. He is currently an Adjunct Professor at the University of California Santa Barbara and an Affiliate Professor at the University of Washington, Seattle. He has also worked in private practice, most recently as the President of a 60-person environmental firm. Dr. Booth formerly was a full-time Research Professor at the University of Washington with a dual appointment in the departments of Civil and Environmental Engineering and Earth and Space Sciences. He was a committee member of the National Research Council's 2009 review of *Urban Stormwater Management in the United States*.

Amicus wishes to supply the Court with an accurate understanding of the stormwater collection process and the municipal separate storm sewer system (MS4). *Amicus* files this brief solely as an individual and not on behalf of the institutions with which he is affiliated.

SUMMARY OF THE ARGUMENT

Storm sewer systems, like the one operated by the Los Angeles County Flood District (the "District"), are

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[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amicus curiae* and his counsel made any monetary contribution to its preparation or submission. *Amicus* has been and is currently a consultant for Respondent Natural Resources Defense Council on other projects not involving the issue of this amicus brief. Written consents from the parties to the filing of this brief are on file with the Clerk.

complex networks of inlets, pipes and outfalls designed to direct stormwater runoff away from residential and commercial areas and out to water bodies in the surrounding areas. Stormwater runoff—water from rain events that runs off the ground—collects an array of contaminants, visible and invisible, as it travels across the landscape. This contaminated stormwater runoff, when it enters rivers and streams, poses a threat to the environment and to human health.

This Court does not need to answer the question presented to find liability under the Clean Water Act for discharges from the municipal separate stormwater system ("MS4") controlled by the District and its Co-Permittees. A closer look at storm sewer systems like the Los Angeles County MS4 makes it clear that the prohibited discharges occurred not within the rivers, but at the outfalls of the storm sewer system.

ARGUMENT

THE PATH OF STORMWATER

A. From Rainfall to Outfall

Stormwater is, at its most basic, water generated during rain events; it is rain after it hits the ground. During and after a rain event, water has to flow somewhere. Its basic hydrologic choices are infiltration, evapotranspiration, and runoff. When water infiltrates, it flows through and below the ground surface, replenishing groundwater stores. When water evapotranspirates, it is returned to the atmosphere from ground surfaces and water surfaces, and through plants. When water runs off, it flows over the ground

surface or through pipes until it joins an existing body of water, such as a stream or a river. In urban areas, the percentage of water that runs off can be a majority of the total rainfall amount; in undeveloped areas, typically very little of the total rainfall, and sometimes none at all, actually runs off the ground surface. (Figure 1).

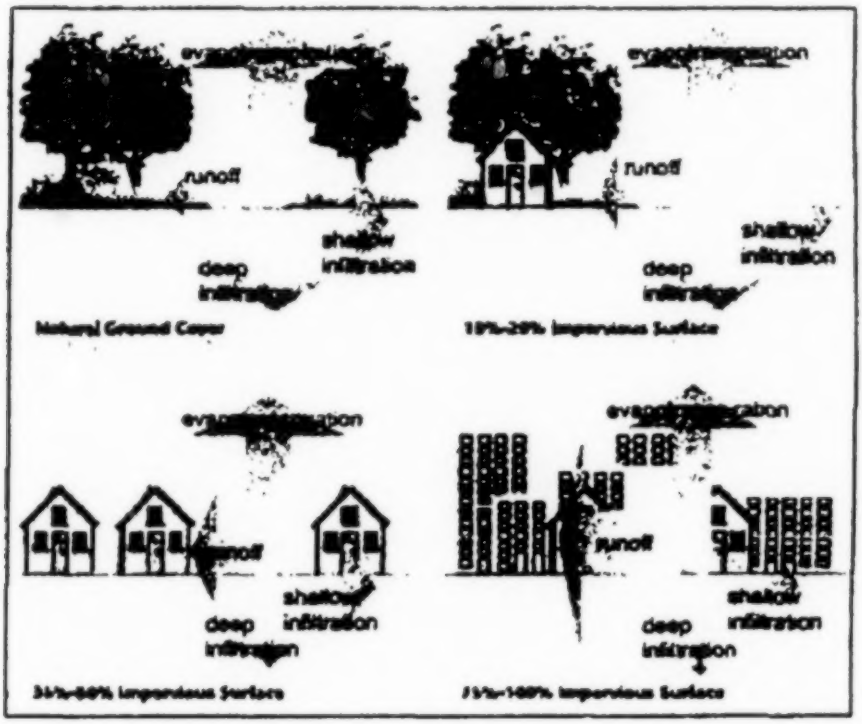

Figure 1. Relationship Between Imperviousness, Drainage Density, and Runoff. COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT'L RESEARCH COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 156 (2009), *available at* http://www.nap.edu/ catalog/ 12465.html.

The water that neither evapotranspirates nor infiltrates but instead runs off the ground surface—the stormwater runoff—is the focus of this brief. As stormwater flows across the landscape, it can collect and transport whatever lies in its path. This can include obvious contaminants such as plastic bags, water bottles, and oil leaked from cars. It can also include contaminants that are not visible to the naked eye such as bacteria from human and animal waste and metals such as copper and zinc.[2] JA 57; UNIV. OF WISCONSIN-EXTENSION, POLLUTED URBAN RUNOFF: A SOURCE OF CONCERN 3 (2009), *available at* http://clean-water.uwex.edu/pubs/pdf/urban.pdf. These contaminants can pose a threat to the environment and to human health.

As it runs across the landscape, contaminated stormwater flows from higher elevations to lower elevations, taking the path of least resistance. In rural areas that have maintained their natural ground cover, the stormwater runoff simply follows the path over or into the ground surface eventually draining into local rivers, lakes, streams, and the ocean. In urbanized settings, impervious surfaces like concrete and asphalt prevent rainwater from soaking into the ground so that a significantly higher percentage of the rainfall becomes stormwater runoff. In this case, the stormwater is transported to local water bodies through a system of pipes known as the storm sewer

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[2] Copper particles can be generated from a number of sources, like normal brake pad use. Zinc can also come from a number of sources, including the wearing down of tires, galvanized metal rooftops, gutters and downspouts.

system, or as it could be called, the stormwater superhighway. The storm sewer system seeks to control and manage the human and environmental effects of stormwater runoff by manipulating the stormwater into subsurface pipes that carry it to nearby rivers, streams, or lakes.

The stormwater inlets through which the runoff accesses the system can be seen at the surface. Figures 2 and 3 depict two common examples of inlets, curb and grate. However, the bulk of the system is underground making it difficult to conceptualize the route stormwater runoff takes.

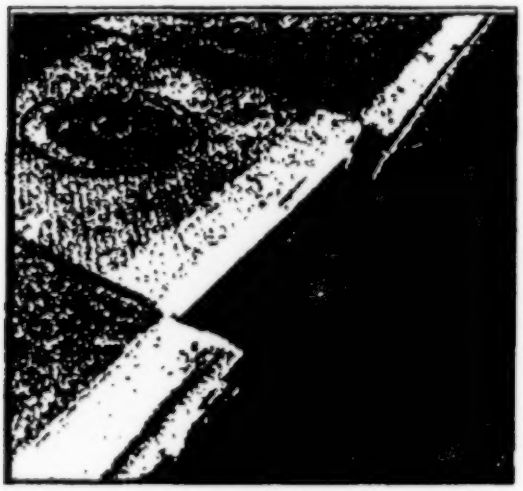

Figure 2. Curb inlet

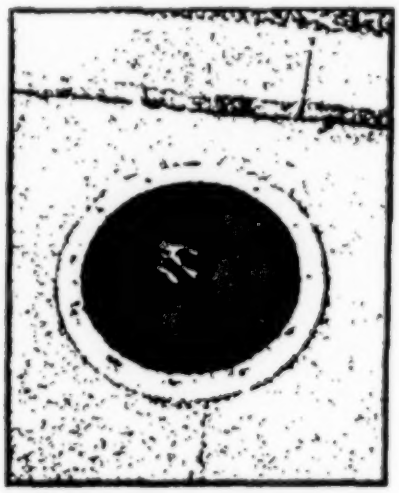

Figure 3. Grate inlet

To help illustrate the journey, consider a hypothetical cloud of copper dust, created when a driver in unincorporated Los Angeles County brakes suddenly during a rainstorm. These copper shavings serve as one small example of the many kinds of contaminants generated in the Los Angeles area every day.

As the rain hits the earth and begins to flow across the land, it picks up and transports the copper shavings. The now-contaminated stormwater runoff is directed by gravity, following any downward path towards an inlet into the storm sewer system or stormwater superhighway.

These copper shavings enter the stormwater superhighway through an inlet, washed in together with the rest of the runoff and other contaminants. After the initial descent, the copper shavings are held at a temporary standstill in a box-like structure made of some form of concrete, metal, or brick, which is referred to as a catch basin. In the catch basin, the copper shavings begin to settle with other debris, sediment and contaminants. The pause is only temporary, and before long, more stormwater runoff enters through the inlet and forces the stormwater and the accompanying mix of copper shavings, debris, sediment and contaminants that did not settle to flow out into the stormwater superhighway.

The storm sewer piping is typically constructed of a material, such as concrete or steel, conducive to water quickly flowing through the system. The journey through the piping network may be several miles or several hundred feet, but eventually the contaminated stormwater—the mix of debris, sediment, copper shavings and other contaminants—must exit the stormwater superhighway into a stream, creek, river, or perhaps even the ocean. These exits, known as outfalls, can have different appearances. (See Figures 4 and 5, for examples). Each outfall—and one storm sewer system has many outfalls—is a location from

which the stormwater runoff including the copper shavings could leave the storm sewer system and enter

Figure 4. Outfall

Figure 5. Concrete outfall

a body of navigable water, like the Los Angeles or San Gabriel Rivers.

B. The Los Angeles Area Storm Sewer System

In most U.S. cities west of the Mississippi, including Los Angeles and its surrounding municipalities, stormwater runs through an entirely separate set of pipes and outfalls from those that are used to convey sewage. These systems are known as separate storm sewer systems. When operated by cities, counties or other governmental entities, they are regulated under the Clean Water Act, and are referred to in that statute as Municipal Separate Storm Sewer Systems, abbreviated as MS4s.[3] The District, along with its Co-

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[3] The term MS4 is a regulatory term, and was created with the introduction of stormwater regulations to define a type of storm

Permittees, operates the MS4 that is central to this litigation.

The storm sewer system (or MS4) in Los Angeles is extensive. The District controls about 2800 miles of drains and 500 miles of open channels. Pet. App. 106. The system is so complex that Mark Pestrella, the Watershed Management Division Engineer of the Los Angeles County Department of Public Works, called it "spaghetti" and could not quantify its exact mileage. JA 293. When it rains in any of the area's cities or unincorporated communities, the stormwater flows into inlets and is then transported through this massive subsurface storm sewer system.

Storm sewer systems, like the one in Los Angeles, have many individual end points, or outfalls, depending on the geography of the area. At these outfalls, the water, contaminated with the detritus of its travels, exits the storm sewer system. It is at these points where the stormwater pollution is added to navigable waters, like the Los Angeles and San Gabriel Rivers.

CONCLUSION

In the Los Angeles area, after rain has fallen in the mountains and canyons and cities, after the runoff has been washed into the drains and inlets, and after it ends its journey through the stormwater superhighway, it exits the storm sewer system (MS4)

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sewer system. Other types include industrial storm sewers and the systems used to collect stormwater at construction sites, which are subject to a different regulatory framework.

at an outfall and enters the Los Angeles and San Gabriel Rivers. The collected pollutants from the stormwater runoff's long travels enter the waters of the United States at these outfalls, adding contaminants such as bacteria, metals, dirt, and oil to the Rivers' flow. The contaminated waters then flow past the mass emissions stations where exceedances of water quality standards have been repeatedly detected. For these reasons, the judgment of the court below was correct and should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-460

IN THE SUPREME COURT OF THE UNITED STATES

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

-v.-

NATURAL RESOURCES DEFENSE COUNCIL, INC, and SANTA MONICA BAYKEEPER,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE CITY OF NEW YORK, NEW YORK STATE CONFERENCE OF MAYORS, AMERICAN WATER WORKS ASSOCIATION, AMERICAN PUBLIC WORKS ASSOCIATION, WATER ENVIRONMENT FEDERATION, ASSOCIATION OF METROPOLITAN WATER AGENCIES, AND NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When water flows from one portion of a river that is a navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that the transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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INTERESTS OF *AMICUS CURIAE*

Amici curiae submit this brief in support of Petitioner, Los Angeles County Flood Control District.[1] *Amici* are or represent local governments, public utilities, water suppliers, and local water management agencies. *Amici* all have direct roles in ensuring that the water we are charged with protecting is clean and safe for a variety of uses, including consumption and recreational use, and in managing stormwater and floodwater in a safe, efficient, and environmentally responsible manner. The Ninth Circuit's ruling, if allowed to stand, would threaten these interests of *amici*.

Amicus the City of New York ("City"), a political subdivision of the State of New York, owns and operates a water supply system that provides drinking water to over eight million City residents and an additional million people in upstate communities. The City also has an elaborate network of storm, sanitary, and combined sewers. These systems all depend on the transfer of water within various bodies of water, using constructed

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[1] Counsel for *amici* authored this brief in its entirety, and no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the City of New York's intention to file this brief. All parties have consented and written consents are being lodged herewith.

channels. The Ninth Circuit ruling jeopardizes the City's ability to supply sufficient water and to manage stormwater and floodwater.

The New York Conference of Mayors ("NYCOM") is a not-for-profit voluntary membership association whose members include 60 of the State's 62 cities and 526 of the State's 551 villages, thereby representing an overwhelming majority of such municipalities. NYCOM's mission is to improve the administration of municipal affairs in New York State through training for municipal officials, and to provide its members with legislative advocacy at both the state and federal levels on issues of concern to local government. This case is of significant concern to all of NYCOM members as they each have a direct role in promoting safe and efficient water management, and an interest in ensuring that suitable laws and regulations apply to their activities.

The American Water Works Association ("AWWA") is the largest and oldest association of water professionals in the world. With 50,000 members, it represents the full spectrum of the water community, including drinking water and wastewater utilities, individual members, consulting firms, manufacturers, academics, and environmental advocates. AWWA's utility members represent both public and private utilities, from the nation's largest to the very smallest, which collectively serve drinking water to about 80 percent of the American population.

The American Public Works Association ("APWA") is an international education and professional association of public agencies, private sector companies, and individuals dedicated to providing high quality public works goods and services. Originally chartered in 1937, APWA is the largest and oldest organization of its kind in the world, with 67 Chapters throughout North American. APWA provides a forum in which public works professionals can exchange ideas, improve professional competency, increase the performance of their agencies and companies, and bring important public works-related topics to public attention in local, state and federal arenas. Working in the public interest, the more than 28,000 members of APWA design, build, operate and maintain transportation, water supply, sewage and refuse disposal systems, public buildings and other structures and facilities essential to our nation's economy and way of life.

Founded in 1928, the Water Environment Federation ("WEF") is a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code whose mission is to preserve and enhance the global water environment. WEF has more than 36,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world. WEF members, Member Associations, and staff work to achieve its mission to provide bold leadership, champion innovation, connect and educate water professionals, and leverage knowledge to support

clean and safe water worldwide. Many WEF members are employed by drinking, wastewater and municipal stormwater utilities; the Ninth Circuit ruling could negatively impact the ability of these local government agencies to supply sufficient water and to manage stormwater and floodwater by unnecessarily expanding the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permitting requirements, the cost of which could hamper their ability to implement innovative practices that actually contribute to improved water quality.

The Association of Metropolitan Water Agencies ("AMWA") is an organization representing 181 of the nation's largest publicly-owned municipal drinking water suppliers. AMWA's members and affiliates include agencies and divisions of city governments and special purpose commissions, districts, agencies, and authorities created under state law to supply drinking water to the public. Collectively, they provide drinking water to over 130 million people throughout the United States. Many AMWA member agencies own or operate lakes, reservoirs, dams, aqueducts, tunnels, pipelines and other conveyances in and through which source waters are collected, stored, moved and otherwise managed as part of their mission to supply adequate supplies of drinking water to the populations they serve. AMWA is concerned that the Ninth Circuit ruling, if upheld, would have a particularly devastating effect in

western states, whose water supply networks often rely on engineered improvements.

The National Association of Clean Water Agencies ("NACWA") represents the nation's publicly owned treatment works ("POTWs") and municipal stormwater utilities. NACWA's nearly 300 member agencies provide the majority of the U.S. population with reliable sewer service and collectively treat and reclaim over 18 billion gallons of wastewater each day. For over 40 years, NACWA has maintained a leadership role in legal and policy issues affecting the public authorities responsible for cleaning the nation's municipal wastewater and stormwater. NACWA members operate their POTWs and municipal stormwater utilities under the NPDES permitting program. NACWA members are concerned, however, that the Ninth Circuit ruling will unnecessarily subject certain aspects of their operations to NPDES permitting for the first time.

SUMMARY OF ARGUMENT

The flow of water from one portion of a river, through an engineered improvement, to a downstream portion of the same river does not constitute a regulated discharge of pollutants under the Clean Water Act (the "CWA" or "Act"), as this Court has recognized in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Should this Court rule otherwise, *amici* will be threatened with burdensome and unnecessary regulation that will

significantly encumber routine water transfers indispensible to the provision of safe and affordable public water supplies as well as safe, effective stormwater and floodwater management.

The instant challenge provides this Court with an opportunity to affirm its prior ruling on this important issue.

ARGUMENT

I

THIS COURT HAS ALREADY DECIDED THAT A TRANSFER OF UNTREATED WATER FROM ONE PORTION OF A BODY OF WATER TO ANOTHER PORTION OF THE SAME BODY DOES NOT CONSTITUTE A "DISCHARGE OF A POLLUTANT" UNDER THE CLEAN WATER ACT.

The Clean Water Act defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362 (12) (emphasis added); *see also* 40 C.F.R. § 122.2 (defining "[d]ischarge of a pollutant" as an addition of a one or more pollutants to the waters of the United States from a point source). Under the Act, a discharge of pollutants to the national waters of the United States requires a NPDES permit. A review of the relevant case law interpreting the Act clearly shows that a NPDES permit is not required in the instant case.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-12 (2004), this Court, in examining whether the petitioner was required to obtain a NPDES permit, recognized that the transfer of water between "two hydrologically indistinguishable parts of a single water body" cannot constitute the "addition" of pollutants under the CWA and thus does not require a NPDES permit. The Court approvingly quoted the Second Circuit's statement, "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot.'" *Id.* at 110, quoting *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001). Accordingly, the Court recognized that the relevant question was whether the two waters at issue were "meaningfully distinct water bodies." 541 U.S. at 112. The *Miccosukee* Court's approach to water transfers was consistent with earlier Circuit Court decisions which held that the movement of pollutants already in water is not an "addition" of pollutants to that water. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 581 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982).[2]

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[2] The City has also been involved in protracted litigation over whether transfers of untreated water between distinct bodies of water require a CWA permit. *See, e.g., Catskill Mts.*, 273 F.3d 481, *on remand* 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd* in part, *remanded* in part, 451 F.3d 77 (2d Cir. 2006); *Catskills Mts. Chapter of Trout Unlimited, Inc. v. Sheehan*,

This Court has also made clear that physical manipulation of water within a single river does not make that water distinct. In *S.D. Warren Co. v. Maine Board of Environmental Protection*, this Court held that the "waters of the United States" remain national waters, even when they are moved or manipulated. 547 U.S. 370, 379 n.5 (2006). In rejecting the notion that when water is impounded, it "'los[es its] status as waters of the United States' . . . and becomes an *addition* to waters of the United States when redeposited into the river," this Court explained that one cannot "denationalize national waters by exerting private control over them." *Id.* (internal citation omitted, emphasis added).

No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 (N.Y. Sup. Ct. Aug. 5, 2008).

In 2008, the United States Environmental Protection Agency ("EPA") promulgated a regulation on such interbasin water transfers, 73 Fed. Reg. 33,697 (June 13, 2008), codified at 40 C.F.R. § 122.3(i), which states that water transfers do not require NPDES permits under the CWA. The various challenges to this rule have been consolidated in the Eleventh Circuit, where litigation is ongoing. *Friends of the Everglades v. United States EPA*, No. 08-13652, 08-13653, 08-13657, 08-14921, & 08-16283 (11th Circuit).

In those cases, among others, *amici* have consistently argued that transfers of untreated water between water bodies do not require NPDES permits. The question before this Court is even more straightforward than the question in those cases, since this case concerns the transfer of untreated water within a single body of water, where the water simply flows through an engineered improvement.

In the instant case, water is transferred from one portion of a river, to a lower portion of the same river, through an engineered improvement. The water is not treated or otherwise processed in any way; thus, the water upstream of the sampling point is hydrologically indistinguishable from the water downstream. The mere presence of an engineered improvement between two portions of a single water body does not thereby render the two portions distinct. *Cf. S.D. Warren Co.*, 547 U.S. at 379 n.5. As in the earlier cases discussed above, nothing has been added to the water body at issue.

As the Ninth Circuit itself recognized, "[w]hile it may be undisputed that exceedances have been detected, responsibility for those exceedances requires proof that some entity discharged a pollutant." *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 898 (9th Cir. 2011). The process of conveying water from one portion of a river to another, hydrologically indistinguishable portion of the same river does not add any pollutants to the water and thus cannot constitute a "discharge." *See* 33 U.S.C. § 1362 (12) ("'discharge of a pollutant' . . . means . . . any *addition* of any pollutant to navigable waters from any point source" (emphasis added)); *see also* 40 C.F.R. § 122.2. In the instant case, there is no addition of pollutants and

therefore no "discharge" under the CWA; thus, no NPDES permit can be required.[3]

II

AMICI RELY ON THE TRANSFER OF WATER WITHIN SINGLE BODIES OF WATER FOR MANAGEMENT OF PUBLIC WATER SUPPLY, STORMWATER, AND FLOODWATER.

Transfers of untreated water through engineered improvements are essential to the design and operation of public water supply systems, flood control efforts, management of stormwater, and structures designed to assist in inland navigation. For example, the operation of canals, locks, and dams involves the movement of water through engineered improvements. All surface water supply systems rely fundamentally on local governments' ability to move water

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[3] When requested to submit a brief in response to the petition for a writ of certiorari in this case, the United States took the position that the Ninth Circuit mistakenly believed "that the part of the [Petitioner's sewer system] in which the monitoring stations sit [i.e., where the "engineered improvement" is located] is distinct from the rivers." Brief for the United States as *Amicus Curiae* at 20. However, the United States admits that "the court's holding would conflict with *Miccosukee*" if the Ninth Circuit had correctly understood the facts and ruled as it did. *Id.* Thus, the only way the United States can construe the Ninth Circuit's opinion as consistent with *Miccosukee* is by assuming that the court failed to understand the facts of the instant case.

through municipal infrastructure designed to meet local water supply needs. Water management systems throughout the country transfer water to areas that need water and away from areas in danger of flooding.

Amici are aware of no engineered structure conveying water *within a single water body* – including the millions of dams and other structures used by the federal, state, and local governments and public utilities to manage water for public water supply, flood control, navigation, and other governmental and public purposes – that is currently subject to a NPDES permit. Many such water management structures predate the enactment of the CWA in 1972 and have been in continuous operation since that time.

EPA has never required that such transfers operate pursuant to CWA permits. In fact, EPA's regulations make clear that EPA does not consider such transfers to be "outfalls." Pursuant to 40 C.F.R. § 122.26(b)(9), the term "[o]utfall . . . does not include . . . conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States." Similarly, none of the more than forty states with delegated authority to administer the CWA permit program has historically required permits for these intra-basin water transfers. The consequences of applying the NPDES permit program to such transfers of water as directed by the Ninth Circuit could be devastating to water

suppliers, local governmental water managers, and the citizens they serve every day across the nation.

If the Ninth Circuit ruling is upheld, all engineered improvements to water bodies across the nation currently operating without permits would be subject to the CWA regulatory program; *amici* would be required to apply for, and NPDES permitting authorities to issue, hundreds of thousands of permits. Such a process, as well as the implementation of permit requirements, could restrict *amici*'s critical activities and impose costly operating conditions with no attendant benefits. Where the water at issue contains no pollutants that are introduced by the engineered improvement, this requirement would place an infeasible burden on the entity operating such improvement – a burden Congress never intended to impose. The CWA was intended to regulate entities that *introduce* pollutants to the navigable waters of the United States, not entities that merely move such water that already contains pollutants discharged by others or naturally occurring. *See* 33 U.S.C. § 1362 (12); *see also* 40 C.F.R. § 122.26(b)(1) (a co-permittee is "only responsible for permit conditions relating to the discharge for which it is operator"); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) (water constituents that are pre-existing in the navigable waters "do not constitute an addition of pollutants by a plant through which they pass"). Accordingly, the Ninth Circuit's holding that water flowing through an engineered improvement in a

single water body constitutes a discharge through an outfall is incorrect and must be struck down.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court reverse the Ninth Circuit's ruling that water flowing through an engineered improvement in a single water body constitutes a discharge through an outfall requiring a NPDES permit, to avoid serious negative consequences for the many public agencies and authorities nationwide involved in water management for water supply, flood control, and related public purposes.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF DOUGLAS EMMETT, INC. IN SUPPORT OF RESPONDENTS

DO NOT REMOVE FROM FILE

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INTEREST OF THE *AMICUS CURIAE*

Douglas Emmett, Inc. owns and operates office properties and luxury apartment communities in the coastal areas of Southern California and Honolulu, Hawaii.[1] With 58 Class-A office properties (totaling approximately 14.7 million rentable square feet), and nine premier apartment communities (totaling 2,868 units), Douglas Emmett is one of the largest private property owners in Los Angeles County. Douglas Emmett is a publicly traded company (NYSE: DEI) with a current market capitalization in excess of $3.2 billion.

The economic prospects of businesses located in coastal regions such as Southern California are fundamentally tied to clean water. The property values and return on investment realized by Douglas Emmett and other owners of real estate are directly and indirectly affected by the performance of coastal industries that depend on clean water, including tourism; leisure and hospitality; beach going and other ocean recreational activities such as diving and surfing; recreational fishing and boating; commercial fishing and shellfish sales; and other related business activities. More generally, property values are supported by the large number of people who live

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that undersigned counsel have authored this Brief in whole, and that no party other than *amicus* have made any monetary contribution intended to fund the preparation or submission of this Brief. Letters of consent to file this Brief have been provided by the parties and are on file with the Court.

in Southern California seeking to take advantage of these activities without fear of pollution.

In Los Angeles County, contaminated stormwater is the single greatest cause of surface water pollution. Businesses in Los Angeles and nearby communities rely on Petitioner, the L.A. County Flood Control District ("District"), to manage its stormwater discharges so that the area's inland streams, rivers, bays and the Pacific Ocean are not polluted. The interests of *amicus* and many other businesses in the California coastal economy would be substantially impaired if the Clean Water Act were re-interpreted, as urged by the District, to allow large municipal dischargers to avoid their statutory responsibilities to prevent harmful stormwater pollution.

SUMMARY OF ARGUMENT

Congress passed the Federal Water Pollution Control Act (the "Clean Water Act" or "Act") in 1972, creating a comprehensive program to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In addition to protecting human health and the environment, Congress recognized the importance of clean water resources to economic and commercial activities. *See, e.g.*, 33 U.S.C. §§ 1315(b), 1343(c).

Congress established a straightforward statutory scheme to achieve the Act's objectives. Section 301 of the Act provides that all discharges of pollutants from point sources into waters of the United States are "unlawful," unless conducted "in compliance

with" specified provisions of the Act, including most importantly the mandate in Section 402 to obtain and comply with the requirements of a pollution discharge permit. *See* 33 U.S.C. §§ 1311(a), 1362(12).

This statutory framework encompasses large municipal stormwater systems such as the District, which operates thousands of individual point source outfalls that discharge polluted stormwater. *See* C.A. ER 155-156; Pet. App. 8. On the face of the Act, each of these outfalls is subject to individual permit requirements and discharge limitations under Section 402.

EPA did not originally promulgate regulations for municipal stormwater discharges. In 1987, however, after lengthy litigation and years of careful consideration of these issues by Congress, EPA, state and local agencies, and municipal system operators, Congress comprehensively addressed municipal stormwater discharges in the Water Quality Act of 1987 (the "WQA").

In the new Section 402(p) of the Act, Congress provided that large municipal systems such as the District could obtain "system- or jurisdiction-wide" permits, instead of being required to obtain and comply with thousands of individual discharge permits. 33 U.S.C. § 1342(p)(3)(B)(i). By definition, such system-wide permits would *not* correspond directly to individual "discharges." To the contrary, as further developed in EPA's implementing regulations promulgated in 1990, these system-wide permits impose broader compliance requirements, including the obligations to (a) meet down-stream

numerical water quality standards; (b) conduct representative instream monitoring, rather than single point source sampling at outfalls, to determine compliance; and (c) implement watershed management and control strategies to reduce pollutant contributions from the localities and activities that use the permitted system for stormwater pollution drainage. *See* 55 Fed. Reg. 47,990, Nov. 16, 1990 (EPA permit application regulations for operators of large municipal stormwater systems).

Congress expressly accorded EPA and the States substantial discretion to develop stormwater permitting approaches designed to prevent violations of water quality standards. Congress understood that such permits would not apply a traditional "end-of-pipe" approach, but rather would rely on water quality sampling data to determine whether water quality standards are met, and would achieve compliance through comprehensive system-wide management strategies.

In 2001, the District chose not to seek individual discharge permits and instead applied for and obtained the system-wide permit at issue in this case (the "Permit"). The District is the "Principal Permittee" and the operator of the substantial majority of the system governed by the Permit. Among other things, the Permit prohibits discharges from or within the District's system "that cause or contribute to the violation of Water Quality Standards." JA 97.

It is undisputed that the Permit's Water Quality Standards were chronically and severely violated.

The District's mass emission monitoring results for the Los Angeles River and San Gabriel River established at least 140 separate violations of the Water Quality Standards, for at least ten different pollutants, including fecal bacteria at hundreds of times the Permit limits, and serious violations for at least six different toxic heavy metals. *See* Pet. App. 108, 117.

As a factual matter, the District's thousands of upstream point source outfalls unquestionably caused or contributed to these chronic violations of the applicable Water Quality Standards, thus violating the terms of the Permit. Since the District failed to ensure compliance with its Section 402(p) system-wide Permit, its underlying point source discharges were unlawful under Section 301(a) of the Act, 33 U.S.C. §§ 1311(a). The Court of Appeals therefore correctly held the District liable for non-compliance with its Permit.

The "question presented" as articulated by the Petitioner in seeking review of this case is a red herring. Water transfers are not at issue here. The reasons provided by the Court of Appeals to support its finding of liability were neither necessary nor even relevant to the District's liability under the plain language of Sections 301(a) and 402(p) of the Act. The Record below includes admissions by the District that the stormwater managed in its system conveyed each of the categories of contaminants violating the Permit's requirements. Given the District's role as owner and operator of the vast majority of the system, its thousands of upstream outfalls unquestionably included discharges of

pollutants that "contribute[d] to" the undisputed violations of the Water Quality Standards. This evidence alone was sufficient to establish the District's liability.

The District and its *amici* argue that the Court of Appeal's misdirected focus on the *factual* question whether the polluted water flowed from the point of monitoring to a downstream receiving water somehow implies an overarching *legal* requirement of specific evidence of a proximate discharge. The District contends it is not enough that it plainly violated the terms of its Permit by causing and contributing to water quality exceedances. It argues the Act requires additional proof of specific pollution discharges from identified point sources located in proximity to the measurement point of the violations.

The District's attempt to engraft this "proximate discharge" requirement as a condition to enforcement of its Permit conflicts directly with the controlling provision of the statute. When Congress authorized "system-wide" permits in Section 402(p), it expressly intended that each municipal stormwater point source would *not* be required to be separately regulated. This approach necessarily relies on representative, instream monitoring. Such monitoring must in itself be sufficient to determine compliance. The District chose to avoid monitoring individual point sources by applying for a system-wide Permit, with compliance determined based on representative sampling. But it now seeks to avoid responsibility for these undisputed violations because it did not monitor the individual upstream

point sources. The District's argument, if adopted by the Court, would make the Permit effectively unenforceable. Such a construct violates both the plain language and purposes of the Act.

In many regions of the Nation, including Southern California, stormwater pollution discharges are among the most acute threats to water quality. Beyond the manifest harm to public health and the environment, water degradation caused by stormwater pollution also has major adverse economic and commercial impacts.

Clean water is an important resource supporting a variety of economic sectors and commercial activities, including tourism; leisure and hospitality; outdoor recreation; beach going; fishing; shell fishing; wildlife-related recreation; and commercial and residential property development. In California alone, the total direct and indirect economic impact of coastal tourism and recreation has been estimated at $22 billion as of 2000, providing over 400,000 jobs. Unchecked stormwater pollution presents a serious threat to the economic health of businesses in numerous industry sectors that rely on achievement of water quality standards as Congress mandated in passing the Clean Water Act.

In summary, after full consideration of the issues associated with municipal stormwater pollution, in 1987 an overwhelming bipartisan majority in Congress explicitly provided that operators of large municipal stormwater systems must comply with system-wide permit requirements to meet applicable water quality standards. The Court should reject the District's argument to upset that legislative

judgment and evade responsibility for compliance with its Permit. The decision of the Court of Appeals should be affirmed.

ARGUMENT

I. The Court of Appeals Correctly Held That the District Failed to Comply With Its System-Wide Stormwater Pollution Discharge Permit.

A. Overview of the Clean Water Act's Discharge Permit Requirements

The centerpiece of the Clean Water Act is its comprehensive permitting program. *See EPA v. Calif. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976). The Act prohibits the *discharge* of a *pollutant* from a *point source* to *waters of the United States*, except *in compliance with* applicable requirements under the National Pollutant Discharge Elimination System ("NPDES") permit program. 33 U.S.C. §§ 1311(a), 1342, 1362(12). The terms of the granted NPDES permit determine the requirements that must be complied with: "the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations" under the Act. *EPA v. Calif.*, 426 U.S. at 205. "Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action." 40 C.F.R. § 122.41(a).

A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, [or] tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "[S]urface runoff which is collected or

channeled by man" and "discharged through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works"—also called "outfalls"—are within the definition of point source discharges under the Act. 33 U.S.C. §§ 1342(p), 1362(14); 40 C.F.R. §§ 122.2, 122.26(b)(9) (defining outfall).

The Clean Water Act requires every NPDES permit to include monitoring sufficient to determine compliance with the permit's requirements. 33 U.S.C. §§ 1342(a)(2), 1318(a)(A); 40 C.F.R. § 122.44(i)(1) (every permit "shall include" monitoring "[t]o assure compliance with permit limitations"). Monitoring required in NPDES permits was intended by Congress to be legally sufficient to determine whether enforceable violations have occurred. *See* S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730, 3731.

B. Congress Amended the Act in 1987 to Regulate Municipal Stormwater Pollution Discharges Through System- and Jurisdiction-Wide Permits.

From the earliest years of the Act, it was clear that municipal stormwater outfalls constituted point source discharges subject to the permit requirements of Section 402. However, EPA initially sought to exempt municipal stormwater systems from the NPDES permit program because it would be administratively infeasible to require individual permits for each outfall of large municipal stormwater systems. *See* 38 Fed. Reg. 18,000 (July 5, 1973). The Court of Appeals for the D.C. Circuit

rejected EPA's exemption on the basis that it conflicted with the plain language of the Act; the court held that EPA was not given authority by Congress to exempt whole categories of point sources from permit requirements. *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1374, 1377, 1380 (D.C. Cir. 1977). Relief could only be obtained from Congress, in the form of amendments to the Act.

Ten years later, after more than four years of hearings and consideration of proposed bills, Congress passed amendments to the Clean Water Act affirming the applicability of the NPDES permit program to municipal stormwater systems. *See* Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7 (1987) (adding new Section 402(p).

Congress had been urged by some municipalities to exempt municipal stormwater discharges entirely, similar to other exemptions such as that for return flows from irrigated agriculture. *See* 33 U.S.C. § 1342(*l*)(1). Congress rejected those efforts. Rather, "[i]n the 1987 congressional debates, the Senators and Representatives emphasized the need to prevent the widespread and escalating problems resulting from untreated storm water toxic discharges that were threatening aquatic life and creating conditions dangerous to human health." *Bldg. Indus. Ass'n of San Diego Cnty. v. State Water Res. Control Bd.*, 22 Cal. Rptr. 3d 128, 134-35, 138-39 (Cal. Ct. App. 2004) (citations omitted).

Section 402(p) affirmed that municipal stormwater system discharges must be authorized by, and in compliance with the terms of, NPDES permits. 33 U.S.C. § 1342(p)(2)(C)&(D). However,

Congress provided that permits for discharges from a large or medium municipal stormwater system—those serving a population of 100,000 people or more—"may be issued on a system- or jurisdiction-wide basis." 33 U.S.C. §§ 1342(p)(2)(C)&(D), 1342(p)(3)(B)(i). Allowing system-wide permits avoided the need for each stormwater outfall to obtain a separate permit, while still imposing the enforceable compliance requirements Congress mandated in Section 301(a) of the Act. *See* 53 Fed. Reg. at 49,451 (Dec. 7, 1988).

Congress intended that the Section 402(p) system-wide permits would facilitate the statutory goals of attaining and maintaining water quality standards. Under the Act, each state must adopt and submit for federal approval water quality standards for all waters within its boundaries. 33 U.S.C. §§ 1313(a)(3)(A) & 1313(c); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). NPDES permits are the "primary means" for ensuring compliance with water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) (citation omitted). In enacting Section 402(p), Congress expressly required that stormwater discharges that "contribute[] to a violation of a water quality standard" be immediately subject to NPDES permit requirements. 33 U.S.C. § 1342(p)(2)(E). This provision reflected Congress's intent that achieving instream water quality standards be a primary focus and requirement under the WQA.

The WQA required municipal discharge permits to mandate technologies that "reduce the discharge of pollutants to the maximum extent practicable." 33

U.S.C. §1342(p)(3)(B)(iii). The WQA further provided that system-wide permits require "such other provisions as the [EPA] Administrator or the State determines appropriate for the control of [stormwater] pollutants." *Id.*

The WQA accorded substantial discretion to EPA, in consultation with the States, to conduct studies and promulgate regulations "establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality. . . . which may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *Id.* at § 1342(p)(5)(C) & (p)(6)(C).

Congress fully understood when it passed the WQA that these system-wide permits would have broader requirements than traditional discharge permits. As Senator Stafford observed in the Senate debate on the Conference Report, in discussing why additional time would be needed for EPA and the States to develop a comprehensive municipal stormwater permitting system:

> These permits will not necessarily be like industrial discharge permits. Often, an end-of-the-pipe treatment technology is not appropriate for this type of discharge. As an EPA official explained in a meeting of the conferees: "These are not permits in the normal sense we expect them to be. These are actual programs. These are permits that go far beyond the normal permits we would issue for an

> industry because they in effect are programs for stormwater management that we would be writing into these permits."[2]

Notably, Congress enacted the WQA with overwhelming bipartisan majorities. The vote approving the Report of the Conference Committee was 406 in favor to 8 opposed in the House of Representatives, and 93 in favor to 6 opposed in the Senate.[3] Congress knew exactly what it was doing when it created this regulatory program and it did so with near-unanimous approval.

C. The District's System-Wide Permit Prohibits Upstream Pollution Discharges That Cause or Contribute to Violations of the Applicable Water Quality Standards.

It is undisputed that the District operates point sources that discharge numerous pollutants regulated under the Act, including fecal bacteria, arsenic, cyanide, mercury, copper, lead, and zinc on a regular basis. Pet. App. 6-8, 17. The District directly owns and operates approximately 2,800 miles of storm drains and 500 miles of open channels, as well as thousands of individual point

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[2] Senate Debate on the Conference Report to Accompany S. 1128, October 16, 1986, Cong. Rec. vol. 132, daily ed., S16424-S16611, 2 Legislative History of the Water Quality Act of 1987 (Public Law 100-4) 616, 617-18.

[3] See Bill Summary and Status, 100th Congress, H.R. 1, Public Law 100-4, http://thomas.loc.gov/cgi-bin/bdquery/z?d100:HR00001:@@@R

source outfalls that discharge these toxic pollutants. Pet. App. 106.

The District applied for, and received, the Permit in question here. The Permit prohibits "discharges from the MS4 that cause or contribute to the violation of Water Quality Standards." JA 97.

The applicable Water Quality Standards establish the permitted limits for fecal bacteria, arsenic, cyanide, mercury, zinc, and other pollutants. Pet. App. 14, 19; JA 370. The District agreed to assume the legal obligation to attain these Water Quality Standards "through timely implementation of control measures and other actions to reduce pollutants" in discharges from the parts of the MS4 "for which it is the operator." JA 93, 98; 40 C.F.R. § 122.26(b)(1). The Permit also requires the District to hold other dischargers into its system "accountable for their contributions of pollutants and flows." JA 109. As Principal Permittee, the District agreed to "facilitate activities necessary to comply" with the permit by all other co-permittees and that it would implement the specified self-monitoring program. JA 103.

As required by the Act, the District's permit included specific monitoring requirements. *See* 33 U.S.C. § 1342(a)(2). Consistent with its "system- and jurisdiction-wide" nature, however, the Permit's monitoring program does not require sampling of discharges from each individual outfall. JA 454. Instead, the District requested and received approval to conduct its monitoring at a small number of representative "instream stations" instead of at each of thousands of individual outfalls.

EPA's regulations required that these "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." 40 C.F.R. § 122.41(j)(1). The District's Permit expressly stated that its instream station monitoring was intended to meet this requirement. JA 218. Sampling is conducted five times a year at designated "mass emission stations" located in major rivers, including in the Los Angeles River and San Gabriel River. Pet. App. 17-18; JA 219. The stated purpose of the Permit's monitoring program is to assess compliance with the Permit, characterize stormwater discharges, and identify pollutant sources. JA 218. This is the entire basis on which the District meets the statutory requirement to demonstrate compliance; as a system-wide permit, there are no further requirements for monitoring any of the District's thousands of individual outfalls. JA 218-221.

D. The Undisputed Evidence Below Proved That the District Violated the Requirements of Its Permit.

The District admits that its monitoring reports proved hundreds of violations of the Permit's Water Quality Standards. Pet. App. 108, 117. The District's undisputed monitoring results show chronic and severe violations of the Water Quality Standards for fecal bacteria, toxic metals, and other pollutants in the Los Angeles and San Gabriel Rivers, at levels that are in some cases hundreds of times greater than the limits permitted under the Permit. *See* C.A. ER 355-364 (table of reported monitoring results).

The District also admits that the relevant "discharges" governed by its Permit are those located *upstream* of the mass emissions monitoring stations. It states in its Brief to this Court that: "Petitioner's pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of 'outfall' and are therefore subject to the Clean Water Act's proscriptions." Brief of Petitioner at 44.

Finally, the District admitted in its deposition testimony under Rule 30(b)(6), Fed. R. Civ. P., that each of the types of measured contaminants found in violation of the applicable Water Quality Standards under the Permit were conveyed in the stormwater in its system. JA 325. Given that the District owns and operates the vast majority of the system, more than all of the other co-permittees combined, as a factual matter its upstream outfalls necessarily were the source of at least some of the measured contamination, if not the substantial majority.

The Permit prohibits "discharges that cause *or contribute*" to exceedances of Water Quality Standards. JA 97 (emphasis added). As the operator of a substantial majority of the permitted system and outfalls, the District's thousands of upstream point sources unquestionably *contributed* to the violations of the Water Quality Standards proven by the instream monitoring. The District therefore failed to ensure "compliance with" the Permit and its upstream discharges were "unlawful" under Section 301(a) of the Act.

E. The Court Should Reject the District's Argument Seeking to Engraft a "Proximate Discharge" Evidentiary Requirement as a Condition to Enforcing the Terms of its Permit.

The Court of Appeals ultimately held—correctly—that the District's permit violations had been proven. In seeking reversal, the District argues that the instream monitoring reports are not sufficient to establish liability. Because it obtained a system-wide Permit, thus avoiding monitoring in proximity to any specific discharge outfalls, the District asserts that the violations of the Permit cannot be traced to any specific outfall and it therefore is not liable. Pet. App. 115. The District effectively seeks to create an additional legal requirement not included in either the Act or the Permit. It argues that it can ignore violations of the plain language of the Permit unless the measuring point for compliance (chosen by the District) can be shown to be geographically proximate to the specific source of the pollutants.

The District's proposed construction is in direct conflict with the controlling provision of the Act governing municipal stormwater discharges, Section 402(p)(3)(B), which allowed the District to elect to obtain its Permit with representative sampling "on a system- or jurisdiction-wide basis." 33 U.S.C. § 1342(p)(3)(B)(i). As a "system-wide" Permit, the compliance monitoring points are by definition *not* tied to individual point source discharges. Nor as a practical matter could they be, given the nature of municipal stormwater systems.

The "question presented" as articulated by the Petitioner—whether water flowing from a constructed portion of a waterway to a natural portion of that waterway is a discharge from a point source—is irrelevant as a matter of law. This supposed question is a red herring, framed by the Petitioner based on the Court of Appeals' misdirected focus on whether there was a "discharge" *downstream* from the monitoring stations. That factual point is not relevant; the controlling question in this case is whether the District was in compliance with its Permit, given that its thousands of *upstream* point source outfalls unquestionably contributed to the violations of the Permit's Water Quality Standards. Because the evidence below overwhelmingly established the District's severe and ongoing violations of the Permit, the decision of the Court of Appeals should be affirmed.

The District essentially asks the Court to issue an advisory opinion; it poses an abstract question of law not actually generated by the facts of the case. The District's intent is clear: to have the Court make a pronouncement altering the legal framework of the Act with the objective of being relieved of enforceable responsibility to comply with its Permit.

The Court should reject these arguments as contrary to the plain language of the statute and the Permit. The result is vitally important given the broader implications for stormwater regulation and the economic and commercial stakes for parties such as the *amicus*. EPA estimates that approximately 1,000 large and medium municipal stormwater

systems (greater than 100,000 persons served) are presently regulated under the Phase 1 program.[4] The holding advocated by the District—seeking to engraft a further specific requirement of proof of proximate discharge, in addition to evidence of permit violations—could be expected to eviscerate the entire "system-wide" permitting scheme enacted by Congress, leaving the statute ineffectual, as a practical matter, to deal with the major water quality problems it was intended to solve. The Court should conclusively reject the District's efforts to have it rework the statutory framework created by Congress.

II. The Clean Water Act's Municipal Stormwater Permit Program Promotes Vital Economic and Commercial Interests in Clean Water.

A. The Act's Comprehensive Water Quality Program Was Intended to Achieve Economic Benefits.

In passing the Act in 1972, Congress recognized that in addition to protecting human health and the environment, clean water resources are fundamental to economic growth and the creation of jobs. The Act required EPA and the States to establish water quality standards and mandated ongoing reporting by the States regarding the economic benefits achieved in seeking to meet those standards,

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[4] National Research Council of the National Academy of Sciences, *Urban Stormwater Management in the United States* (2009) ("NRC Stormwater Report") at 36, available at *http://www.nap.edu/catalog/12465.html.*

including "propagation of shellfish, fish and wildlife," "recreational opportunities" and other "economic and social benefits." *See, e.g.*, 33 U.S.C. § 1315(b). Section 1343(c) of the Act imposed specific requirements for preventing degradation of oceans and coastal waters, including provisions addressing "the effect of disposal of pollutants on esthetic, recreation and economic values." *Id.* § 1343. The Act provided that, "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.* § 1251(a)(2). As reflected in these provisions, Congress clearly recognized the important link between clean water, commercial interests and economic growth.

B. Unchecked Stormwater Pollution Threatens the Economic Benefits of Clean Water.

Municipal stormwater pollution is continuing to impede the achievement of water quality standards and related economic benefits. In October 2008 the National Research Council released the report *Urban Stormwater Management in the United States* finding, among other things, that "the rapid conversion of land to urban and suburban areas has profoundly altered how water flows during and following storm events, putting higher volumes of water and more pollutants into the nation's rivers, lakes, and estuaries. These changes have degraded

water quality and habitat in virtually every urban stream system."[5]

EPA followed on these findings in a subsequent notice:

> The role of MS4s in reducing stormwater impacts from the built environment is crucial and growing, given that these sources of adverse water quality impacts are continually expanding. As the urban, suburban and exurban human environment expands, there is an increase in impervious land cover and therefore an increase in stormwater discharges. This increase in impervious land cover reduces or eliminates the natural infiltration of precipitation, which greatly increases the volume of stormwater discharges. This increased volume of stormwater discharges results in the scouring of rivers and streams; degrading the physical integrity of aquatic habitats, stream function and overall water quality.[6]

Stormwater pollution is a "major cause of water quality impairment nationwide," 64 Fed. Reg. at 68,726. According to the National Research Council, citing data from the EPA's 2002 305(b) report, urban

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[5] NRC Stormwater Report at 1, 25.

[6] EPA Notice, Stakeholder Input: Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617-01 (December 28, 2009).

stormwater was listed as the primary source of water quality impairment for 13% of all rivers, 18% of all lakes, and 32% of all estuaries in the Nation.[7] EPA's most recent water quality report found that more than half of ocean and near coastal waters remain impaired, with urban related stormwater runoff contributing to approximately 25% of the impaired waterway miles.[8] "Urban-related runoff/ stormwater" is listed as the third largest source of impairment for assessed ocean and near coastal waters.[9]

In California, contaminated stormwater is now the single greatest cause of surface water pollution. Pet. App. 6; JA 432. Los Angeles and surrounding areas "face[] the largest concentration of [stormwater] pollution" in the state. C.A. ER 302 (State Water Res. Control Bd. Resolution No. 2003-0013). Toxic stormwater runoff plumes resulting from discharges from the District's system can persist for days at a time, causing beach closures as well as major health and environmental impacts. JA 361.

Stormwater impacts have substantial economic effects in other regions of the country as well. For example, a 2007 Brookings Institution study estimated the direct economic benefits of Great Lakes clean up and restoration from tourism, fishing and recreation at $6.5 to $11.8 billion. They also

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[7] NRC Stormwater Report at 25.

[8] *See* EPA Water Quality Assessment and Total Maximum Daily Loads Information, National Summary, available at: *http://ofmpub.epa.gov/waters10/attains_nation_cy.control.*

[9] *Id.*

estimated a $12-$19 billion increase in property values following the cleanup.[10]

Similarly, the Chesapeake Bay watershed in Delaware (1) contributes over $2 billion in annual economic activity from benefits associated with water quality, water supply, ecotourism, recreation, agriculture, forest, open space, and navigation, and (2) is directly and indirectly responsible for 47,000 jobs with $1.2 billion in annual salaries.[11]

The economic benefits of clean water with respect to a variety of industries and commercial activities are discussed below:

Tourism, Beach Going, Boating, and Leisure and Hospitality. The recreation and tourism industry is one of the top employers in the United States. Each year, Americans take more than 1.8 billion trips to water destinations, largely for recreation, spending money and creating jobs in the process.[12]

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[10] *See* Austin, et al., The Brookings Institution Great Lakes Economic Initiative, *Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem* (Metropolitan Policy Program September 2007) at 6, available at *www.brookings.edu/metro/pubs/20070904_gleiecosystem.pdf*. The study notes that: "With 8 million swimmers and 80 million swimming days annually in the Great Lakes, the economic benefit from a 20 percent reduction in beach closings and advisories would be $130 to $190 million per year, which translates into a present value of about $2 to $3 billion dollars."

[11] *See* Kaufman *et al.*, *Socioeconomic Value of the Chesapeake Bay Watershed in Delaware*, University of Delaware, March 2011, accessible at: *http://www.ipa.udel.edu/publications/DelChesapeakeWatershed.pdf*.

[12] EPA, *Liquid Assets 2000: America's Water Resources at a Turning Point* ("Liquid Assets 2000") (May 2000).

Nationally, the economic value of coastal recreation—including beach-going, angling, bird watching and snorkeling/diving—and related tourism, has been estimated as high as $60 billion to $70 billion annually.[13] In the California coastal zone, beach recreation and tourism is the single largest economic sector,[14] creating an estimated $22 billion in annual expenditures and more than 400,000 jobs in 2000.[15] In Los Angeles and Orange Counties alone, the annual economic output resulting from beach recreation is estimated at approximately $3.53 billion.[16]

Recreational boating also generates considerable economic value for the coastal economy. In 2008, 28.3% of U.S. adults went boating at least once. Recreational marine manufacturers employed more than 135,900 people and retail boating/service businesses employed another 217,718 people.[17]

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[13] *See* Restore America's Estuaries, *The Econ. & Mkt. Value of Coasts and Estuaries: What's At Stake?* (Pendleton, ed.) ("Value of Coasts") at 165, available at *http://www.era.noaa.gov/pdfs/052008final_econ.pdf.*; *see also* State of the Ocean and Coastal Economies 2009 at 6, available at: *http://www.oceaneconomics.org/nationalreport/.*

[14] Kildow et al., *California's Ocean Economy, Report to the Resources Agency*, State of California (July 2005), available at *http://resources.ca.gov/press_documents/CA_Ocean_Econ_Report.pdf.*

[15] *Id.* at 123.

[16] Wiley, et al., *Economic Impact of Beach Closures and Changes in Water Quality for Beaches in Southern California* at 15 (NOAA 2006).

[17] Southwick Assoc., *The Economics Associated with Outdoor Recreation, Natural Resources Conservation and Historic*

The leisure and hospitality sectors are responsible for approximately $73.5 billion in GDP in California annually, employing approximately 1.6 million workers in more than 86,000 establishments.[18] Beaches and coastal areas are a major focus of this industry in California.

These and other economic activities are put at risk by the discharge of polluted stormwater. Nationally, an estimated 36% of the approximately 22,000 days of beach closures in 2011 were caused by polluted runoff and stormwater.[19] In California, the Los Angeles County Department of Health Services has identified increased health danger associated with storm water pollution and has a standing rain advisory that "recommends that beach users avoid contact with ocean water, especially near flowing storm drains, creeks and rivers for a period of 3 days after rainfall ends."[20] In one study on the health of Los Angeles County's beaches conducted in 2002-2003, 56 percent of monitored beaches received a failing grade during wet weather (when storm drains

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Preservation in the United States, Report for the National Fish and Wildlife Foundation (2010).

[18] Kildow, et al., National Ocean Economics Program, *State of the U.S. Ocean and Coastal Economies, 2009*, available at *http://www.oceaneconomics.org/NationalReport/*.

[19] NRDC, *Testing the Waters, A Guide to Water Quality at Vacation Beaches* (2011), available at *http://www.nrdc.org/water/oceans/ttw/ttw2012-ExecutiveOverview.pdf*.

[20] Cal. Environmental. Protection Agency, State Water Resources Control Board, *Erase the Waste* (Updated 3/26/2009), available at *http://www.waterboards.ca.gov/water_issues/programs/outreach/erase_waste/swpollution.shtml*.

are active), meaning the conditions were hazardous to human health and would have adverse health effects to swimmers who enter the water.[21] During 2002, there were 269 warnings posted on Los Angeles County beaches for a total of 1,181 beach-days where the ocean was too polluted for human use.[22] This represents 1,181 days of lost revenue to businesses. More generally, if pollution discharges continue, ultimately many tourists will vacation elsewhere, and many residents will move. Beach closures have a significant economic impact on coastal regions.

Commercial and Recreational Fishing and Wildlife-Related Recreation. Spending associated with fishing and wildlife supports hundreds of thousands of jobs in related industries. In 2006, 29% of the U.S. population participated in fish- and wildlife-related recreational activities. This group spent more than $122 billion, accounting for approximately 1% of the nation's gross domestic product (GDP).[23]

In 2009 alone, 11 million recreational anglers across the U.S. spent $4.5 billion on fishing trips and $15 billion on durable fishing-related equipment.[24]

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[21] *Id.*

[22] *Id.*

[23] U.S. Fish and Wildlife Service, *2006 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation National Overview, Preliminary Findings* ("FWS 2006 Survey") at 4, available at *www.fws.gov/fisheries/pdf_files/nat_survey2006.pdf.*

[24] National Oceanic and Atmospheric Administration, *National Overview*, ("2009 NOAA Report") at 11, available at

Coastal county residents made up 84% of total anglers. [25] Expenditures related to recreational fishing kept over 327,000 people employed on a full- or part-time basis across the U.S., including 13,567 people employed in California. [26]

Commercial fishermen earned $3.9 billion annually for their 7.9 billion pounds of catch.[27] The U.S. seafood industry—including the commercial harvest sector, seafood processors and dealers, seafood wholesalers and distributors, importers and seafood retailers—employ approximately 1 million people on a full- or part-time basis, contributing $48.2 billion in GDP.[28] In California the seafood industry employs 120,583 people, and generates $20 billion in annual sales.[29]

Waters threatened by stormwater pollution support all of these activities. [30] Wetlands and estuaries play essential roles in the lifecycles of 75 percent of fish and shellfish commercially harvested and up to 90 percent of fish recreationally caught in

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http://www.st.nmfs.noaa.gov/st5/publication/econ/2009/US_ALL_Econ.pdf.

[25] *Id.*

[26] *Id.*

[27] *Id* at 5.

[28] *Id* at 5.

[29] *Id* at 6.

[30] Liquid Assets 2000 at 2; Lellis-Dibble *et al.*, *Estuarine Fish and Shellfish Species in U.S. Commercial and Recreational Fisheries: Economic Value as an Incentive to Protect and Restore Estuarine Habitat*, (NOAA 2008), available at *http://spo.nmfs.noaa.gov/tm/TM90.pdf.*

the United States.[31] Since 1998, degradation of the Nation's waters has resulted in thousands of fish consumption advisories or bans.[32] According to EPA, in 1998 "2,506 fish consumption advisories or bans were issued in areas where fish were too contaminated to eat."[33] Unpolluted water ensures that fish remain healthy and protects the economic viability of our fisheries.

Commercial and Residential Property Values. All of the economic benefits associated with clean water discussed above, as well the broader quality of life experience of residents and visitors in coastal regions, impact property values. For example, one report found that a home's proximity to water raises property values by up to 28 percent.[34] EPA has estimated that improved water quality can raise property values by up to 18% next to the water, 8% at 1,000 feet from the water, 4% at 2,000 feet from the water, and 2% at 3,000 feet from the water.[35] Commercial and residential property values in coastal areas such as Los Angeles County

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[31] EPA, *Economic Benefits of Wetlands* (1995), available at *http://www.epa.gov/owow/wetlands/pdf/EconomicBenefits.pdf.*

[32] Liquid Assets 2000 at 2.

[33] *Id.*

[34] Value of Coasts at 66.

[34] Environmental Protection Agency, *Economic Benefits of Runoff Controls* (September 1995), available at *http://water.epa.gov/polwaste/nps/econ_ben_runoff_control.cfm.*

[35] Environmental Protection Agency, *Benefit of Water Pollution Control on Property Values*, (Oct. 1973), available at *http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0009.pdf/$file/EE-0009.pdf.*

unquestionably reflect the underlying value of these natural resources.

* * * * *

Continued implementation and enforcement of the Act's Section 402(p) municipal stormwater program is vitally important to realizing the substantial economic growth and jobs benefits generated by the sectors and activities discussed above. Congress passed the Clean Water Act with the intention of ensuring the availability of clean water resources to support these benefits. The Court should uphold the system-wide permit framework enacted by Congress and reject the District's arguments seeking to avoid responsibility for compliance with its Permit.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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November 5, 2012

AMICUS CURIAE BRIEF

No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* FRIENDS OF THE EVERGLADES IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Friends of the Everglades ("Friends") was one of the two plaintiffs in *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"). In the instant appeal, this Court granted *certiorari* on the question of whether the Ninth Circuit decision in the *County of Los Angeles* storm water case conflicts with *Miccosukee*. After remand in *Miccosukee*, the matter of water transfers was tried in a related case concerning the NPDES permit requirement for a transfer of polluted water from a different drainage canal by the South Florida Water Management District. *See Friends of the Everglades, Inc. v. South Florida Water Mgmt. Dist.*, 2006 WL 3635465 (S.D. Fla. 2006), *rev'd*, 570 F.3d 1210 (11th Cir. 2009).[2] Over the course of a two-month bench trial in that case, Friends, the District, and EPA explored the practical application of the *Miccosukee* Court's "meaningfully distinct" test. Having litigated water transfer issues for almost a decade, Friends can offer helpful insights into the practical

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[1] The parties have consented to the filing of this brief. *See* Sept. 5, 2012 Consent of Respondent; Sept. 13, 2012 Consent of Petitioner. In accordance with Rule 37.6 of this Court, counsel for Friends of the Everglades authored this brief in its entirety, and no person or entity other than Friends of the Everglades and their representatives made any monetary contribution to the preparation or submission to this brief.

[2] The basis for the reversal was adoption of an administrative rule after briefing on appeal was completed. 570 F.3d at 1218.

application of *Miccosukee* to water transfers within and between "meaningfully distinct" water bodies. In particular, Friends has extensive experience in the development and purpose of the administrative rule exempting water transfers upon which Petitioner Los Angeles County relies in seeking reversal.

As a conservation organization established for the purpose of protecting Florida's Everglades and its magnificent surrounding natural resources, Friends has a direct interest in the outcome of this case. Effective application of the Clean Water Act's urban storm water provisions at issue in this case would serve to protect the Everglades, its headwaters at Lake Okeechobee, its downstream South Florida estuaries, and the Florida Keys. Protections for these national treasures should not be diminished.

Friends respectfully submits this brief in support of Respondents Natural Resources Defense Council, Inc. and Santa Monica Baykeeper, and urges the Court to affirm the decision of the Ninth Circuit.

SUMMARY OF THE ARGUMENT

No "water transfer" is presented in this case because as used by this Court in *Miccosukee,* that term refers only to transfers between navigable waters of the United States, such as pumping contaminated canal water up into a drinking water reservoir. Instead, this case involves only a discharge from a municipal storm sewer system into navigable waters of

the United States. The new EPA "water transfer" rule exempting water transfers from NPDES permitting exempts only transfers between navigable water bodies, and has no bearing on discharges from municipal storm sewer systems. That administrative rule is also under challenge and is in the process of being adjudicated by lower courts. The argument that municipal storm sewer systems are exempt from NPDES permitting because they are not the original source of the pollutants was considered and squarely rejected by this Court in *Miccosukee*.

ARGUMENT

Petitioner Los Angeles County's brief at page 33 suggests that discharges from its separate storm sewer system are exempt under the Environmental Protection Agency's recent administrative rule exempting most water transfers between navigable waters of the United States from the requirement to obtain point source permits. *See* 40 C.F.R. § 122.3(i). Large urban municipal storm sewer systems are subject to NPDES permitting by statutory mandate. *See* 33 U.S.C. § 1342(p). No water transfer is at issue in this case because there is no conveyance of water between two navigable water bodies that are "meaningfully distinct." This case presents only a discharge from a municipal storm sewer system into two navigable rivers: the Los Angeles and the San Gabriel. Discharges from large municipal separate storm sewer systems are plainly subject to NPDES permitting under 33 U.S.C. section 1342(p) and no

administrative rule can change that statutory requirement.

In *Miccosukee*, the issue was whether a pumping station conveying contaminated canal water into the Everglades constituted a point source within the meaning of 40 U.S.C. section 1342, and therefore needed an NPDES permit. 541 U.S. at 98-99. Both the canal water and the Everglades were navigable waters of the United States. *Id.* at 102, 105-06. The Court did not reach the question of whether an NPDES permit was required for pumping polluted water into the Everglades. Instead, it remanded for a determination as to whether pumping water out of the drainage canal conveyed water to where it would not have gone naturally. Where water flows naturally from one water body to another, the waters are not "meaningfully distinct." Otherwise, the discharge of the Mississippi River into the Gulf of Mexico would require an NPDES permit.

After this Court's decision in *Miccosukee*, EPA adopted an administrative rule exempting most water transfers from the NPDES permitting requirement. 40 C.F.R. § 122.3(i).[3] That rule is currently under

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[3] The following discharges do not require NPDES permits:

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

challenge by a large number of parties and numerous parties intervened to defend the rule. The challenges were consolidated in the Eleventh Circuit, which ultimately dismissed the case for lack of subject matter jurisdiction on October 26, 2012. *Friends of the Everglades v. United States EPA*, Nos. 08-13652, 08-13653, 08-13657, 08-14921, & 08-16283, slip op. (11th Cir. Oct. 26, 2012). A number of cases challenging the rule are pending in district courts. *Id.* at 8.

In its *amicus* brief, the National Governor's Association contends at page 20 that no municipal separate storm sewer system is subject to NPDES permitting if that system serves only "as a conduit through which the pollutants pass without being regulated or controlled." That proposition was considered and rejected by the *Miccosukee* Court's holding that NPDES permits are required for conveyances of pollutants into navigable waters regardless of whether the conveyance is itself the original source of the pollutants. 541 U.S. at 104-05.

CONCLUSION

For these reasons, Friends of the Everglades respectfully submits that this Court should affirm the decision of the appeals court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FRIENDS OF THE LOS ANGELES RIVER, COMMUNITIES FOR A BETTER ENVIRONMENT, AND L.A. RIVER EXPEDITIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

DO NOT REMOVE FROM FILE

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QUESTION PRESENTED

The Court granted certiorari limited to Question 2 presented by the petition (Pet. Cert. i):

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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INTERESTS OF THE AMICI CURIAE[1]

Friends of the Los Angeles River (FoLAR)[2] is a non-profit organization founded in 1986 and dedicated to the protection and restoration of the natural and historic heritage of the Los Angeles River and its riparian habitat through inclusive planning, education, and wise stewardship. Since its founding, FoLAR's leadership has been central to the rapidly intensifying revitalization of the River, including numerous new urban parks, recreation facilities, and river-based education and science programs. Increasing public access and use of the river for recreation and education is a major FoLAR objective, particularly in the densely populated, park-poor urban neighborhoods through which most of the river runs. More than 10,000 people are connected to the river through FoLAR's extensive website and social media. Each spring about 4,000 people volunteer for a river-length cleanup that removes an average 25 tons of trash. Thousands more participate in FoLAR's river-based year-round education programs. Public use of the river for boating, biking and fishing is growing rapidly. FoLAR-sponsored State legislation (SB 1201) signed into law this autumn requires the Los Angeles County Dept. of Public Works to manage the River for recreation and education, not merely for flood control purposes. Rapidly growing human use of the

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[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] http://folar.org.

River makes the quality of the water of paramount concern.

FoLAR advocates for enhanced water quality standards, and based on these standards, improved practices and controls to reduce the discharge of contaminants from the massive storm drain system and the washes, which feed directly into the river. FoLAR has conducted independent studies to establish the safety and edibility of fish taken from the river. Heavy metals and fecal contaminants are of particular concern in this case due to increasing human contact with the water. FoLAR submits this brief because timely enforcement of the NPDES permit at issue in this case is essential; this Court's ruling will have significant implications for water quality in the Los Angeles River, the River's revitalization, and the citizens of Los Angeles.

Communities for a Better Environment (CBE)[3] is a nonprofit organization with offices in Huntington Park, California (Los Angeles County) and Oakland, California. CBE has thousands of members throughout the State of California, more than 2,600 of whom live, work, or engage with environmental justice issues in urban communities in Northern and Southern California. CBE and its members are dedicated to building people's power in California's communities of color and low-income communities to achieve environmental health and justice by preventing and reducing pollution, and building green, healthy, and sustainable communities and environments. In this vein, CBE

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[3] http://cbecal.org.

works to prevent industrial and other pollution from entering California's urban waterways.

In Southern California, CBE works specifically in the communities of Southeast Los Angeles, through which the Los Angeles and San Gabriel Rivers run, and in Wilmington, which sits beside San Pedro Bay and into which the Los Angeles River flows. CBE's members reside near the Rivers and the Bay. They recreate alongside the Rivers, and rely on the Bay for aesthetic, recreational and other activities, such as fishing and birdwatching. Some of CBE's members would like to eat fish from the Bay, but cannot because of Bay pollution. Members also use both the Rivers and the Bay for engaging in scientific study, including monitoring activities. CBE joins this brief because this Court's ruling will have a direct effect on CBE and its members' abilities to use and enjoy the Los Angeles River and the Bay, and to ensure that the River and the Bay do not suffer irreparable harm as a result of violations of the federal Clean Water Act.

L.A. River Expeditions[4] has been at the forefront of recreational boating on the Los Angeles River, starting with its 2008 boating expedition down the full fifty-one miles of the river. The U.S. Environmental Protection Agency cited this 2008 expedition in its special-case navigability determination for the river in July 2010. L.A. River Expeditions has also been a leading advocate—along with partners like the U.S. Army Corps of Engineers and the City of Los Angeles—in the quest for finding a fair balance between the needs of urban residents,

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[4] http://lariverexpeditions.com.

the habitat of native flora and fauna, and flood protection and other safety issues.

Over the last two years, through the efforts of L.A. River Expeditions and other organizations, nearly 3,500 people—young and old alike, and from all walks of life—have participated in guided, educational canoe/kayak trips down one of several green stretches of the river. This newfound access and enjoyment of the river is an enormous improvement relative to the prior eight decades since the river was channelized, during which the river experienced widespread neglect and abuse.

The river's water quality is perhaps the key concern of our participants. Water is by its nature inextricably interconnected, whether it springs naturally or comes to the watershed as stormwater. Without unequivocal protection of the water itself, and a better plan for sustainable water management solutions, the efforts toward a revitalized river for the community's benefit would be largely in vain. Water is the lifeblood of our future as a livable, sustainable city, and we must not waver in its complete protection. L.A. River Expeditions joins this brief, as the ruling of this Court will have a direct impact on these efforts.

SUMMARY OF ARGUMENT

The Los Angeles County Flood Control District has constructed a Supreme Court case out of whole cloth. No one disagrees as to the answer to the scenario in the question presented. But the answer to that scenario will not resolve this case. Rather, the question presents an entirely hypothetical

scenario that has no relevance to the finding of liability in the court below.

Everyone in this case agrees that the rivers at issue are navigable waters of the United States in their entirety. Man-made alterations to a river, such as artificial channelization, do not affect its status as a water of the United States. *See infra* Part I.

A municipal storm sewer is a legally defined entity that conveys stormwater through an outfall into a water of the United States. Congress chose to regulate municipal storm sewers precisely because those sewers take urban runoff and dump it into waters of the United States. *See infra* Part II.A.

So by legal definition—and in practice—the District's municipal storm sewer discharges into the navigable Los Angeles and San Gabriel Rivers at a set of outfalls.

The question presented, however, misuses the term "outfall" and misconstrues the legal and factual scenario to manufacture a supposed issue worthy of this Court's review. The question presented is irrelevant to the determination of liability in this case for two reasons.

First, municipal storm sewers, by definition, discharge into waters of the United States, as a matter of law. The question discussed in *Miccosukee Tribe*—whether there has been an addition to navigable waters—is simply absent here. *See infra* Part II.B.

Second, the question presented contemplates a hypothetical municipal storm sewer that accepts water from a river and then "discharges" it through an "outfall" within that same navigable river. This

situation is legally impossible under the Clean Water Act because it is at odds with the regulatory definitions of municipal storm sewer and outfall. It is also at odds with the undisputed fact that the District's municipal storm sewer carries runoff from local storm drains and discharges that runoff into the San Gabriel and Los Angeles Rivers.

Accordingly, we respectfully request that this Court dismiss its writ because a ruling on the hypothetical situation in the question presented would be unnecessary in law.

ARGUMENT

This case does not raise the question presented. Indeed, no one—not the Petitioner, not the Respondents, and not the United States—disagrees as to the answer to the hypothetical scenario in the question presented. (Br. of Pet'r 32; Br. for Resp'ts 1; Br. for the U.S. 19.)

The question presented assumes incorrectly that the Los Angeles County Flood Control District's ("District's") liability in this case turns on whether conveying water from one part of a navigable river into another part of the same river can constitute a discharge—an "addition to navigable waters" of polluted stormwater—under the Clean Water Act's NPDES permitting program.

The Los Angeles and San Gabriel Rivers ("Rivers") are both navigable waters. *See infra* Part I.

Urban stormwater unquestionably flowed from outside the Rivers through the District's municipal

storm sewer[5] into these navigable Rivers. The law defines these points at which the stormwater flowed into these navigable Rivers, rather than any points within the Rivers, as the points of discharge. *See infra* Part II.A.

The finding of liability thus does not depend on the answer to the question presented or the issue discussed in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109–12 (2004). *See infra* Part II.B and C.

This Court should therefore dismiss the writ of certiorari as improvidently granted.

I. The Los Angeles and San Gabriel Rivers are navigable waterways in their entirety

The United States Environmental Protection Agency ("EPA") has previously found that the Los Angeles River is both a water of the United States and navigable in fact. No party disputes the Rivers' status as "navigable waters of the United States." Consistent with case law on the issue, no party has argued that alterations, such as channelization of a river for flood control purposes, could affect its status as a water of the United States. Furthermore, federal, state and local governments, as well as residents of Los Angeles County, have treated and continue to treat the Los Angeles and San Gabriel Rivers as rivers, not as storm sewers or mere flood control channels.

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[5] This brief will use the term "municipal storm sewer" to refer to the municipal separate storm sewer system, or MS4, referenced in 33 U.S.C. § 1342(p) and corresponding federal regulations. *e.g.*, 40 C.F.R. § 122.26.

A. All parties agree that the Los Angeles River and the San Gabriel River are navigable waters in their entirety

No party disputes that the Los Angeles and San Gabriel Rivers are navigable waters in their entirety. In its petition for rehearing en banc in the Ninth Circuit, for example, the District argued that "the rivers are navigable waters, notwithstanding their channelization." (Pet. of Def.-Appellee LACFCD for Rehearing 9; Br. of Pet'r 15 (recounting the argument for rehearing).) The United States also agrees that the Rivers are navigable waterways. (*See* Br. for U.S. 13 n.5 ("The Los Angeles and San Gabriel Rivers are waters of the United States . . . ."); Br. for U.S. on Pet. Cert. 17 ("The court of appeals recognized that the Los Angeles and San Gabriel Rivers are waters of the United States in their entirety (Pet. App. 42), and none of the parties ever contended otherwise").)

EPA has determined not only that the Los Angeles River is a water of the United States—a status commonly referred to as "navigability"—but also has specifically found that the River is navigable in fact.[6] U.S. Envtl. Prot. Agency Region IX, Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional

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[6] This brief will use the terms "waters of the United States" and "navigable waters" interchangeably, since both refer to the same set of waters in this case. These terms are broadly defined to include waters that are not navigable in fact, including but not limited to tributaries of traditional navigable waters. *Rapanos v. United States*, 547 U.S. 715, 731 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133–34 (1985).

Navigable Water 4 (July 1, 2010)[7] [hereinafter "EPA Navigability Determination"]. In 2010, the EPA found that the entire 51-mile main stem of the Los Angeles River was a traditional navigable water for purposes of jurisdiction under the Clean Water Act. EPA Navigability Determination at 3. Following criteria from the Clean Water Act, federal regulations, case law, and agency guidance in light of this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the EPA assessed historical and recent information and determined that the Los Angeles River is susceptible to commercial navigation. *Id.* at 4, 35.

B. Alterations to a river for flood control purposes do not affect its status as a "water of the United States"

The Rivers, like many urban rivers, are channelized for flood control purposes. EPA Navigability Determination at 8; County of L.A. Dep't of Public Works, San Gabriel River Corridor Master Plan 2-30 (2006)[8] [hereinafter "San Gabriel Master Plan"]. While much of each of the Rivers is contained with concrete trapezoidal or rectangular concrete channels ("alterations"), *see, e.g.*, EPA Navigability Determination at 8–9, about 12.3 miles of the Los Angeles River has unlined (soft-bottom) channel bottoms, which support riparian and wetland vegetation, *id.* at 9. The average daily flow

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[7] *Available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterOnly.pdf.

[8] *Available at* http://dpw.lacounty.gov/wmd/watershed/sg/mp/mp.cfm.

of water through the river averages around 1 foot, but can hit a maximum depth of around 8 feet during flood events. *Id.* at 18–21, figs. 8–10 & tbl.5.

The District has stated—indeed, argued—that "artificial channelization of navigable waters does not alter their character for purposes of the CWA." (Pet. Cert. 15–16 (referencing *Rapanos*, 547 U.S. at 769); *see also id.* at 31 ("[W]hile petitioner may operate channelized portions of the Los Angeles and San Gabriel Rivers for flood control . . . . the rivers retain their status as navigable waters . . . .").) The United States agrees with that characterization. (Br. for U.S. 13 n.5 ("[N]either the channelization of the rivers nor their use within that [flood-control] infrastructure alters their status as waters of the United States.").) As do the Respondents. (Br. for Resp'ts 64.)

According to regulations implementing the Rivers and Harbors Act, 33 U.S.C. § 401, artificial channels—even those that may be a major portion of a river—do not preclude a finding that a water body is navigable in fact. 33 C.F.R. § 329.8(a). Navigability instead turns on capability to transport interstate commerce and use by the public. *Id.*; *see, e.g.*, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940) (basing navigability on only the natural condition of the waterway is error); *United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (accumulating cases).

Nor does intermittent flow or absence of navigability-in-fact necessarily exclude a water body from the class of "waters of the United States" under the Clean Water Act. *Rapanos*, 547 U.S. at 769–70 (2006) (Kennedy, J., concurring); *United States v.*

Moses, 496 F.3d 984 (9th Cir. 2007); *Eidson*, 108 F.3d at 1342 (accumulating cases). Tributaries of waters of the United States are themselves waters of the United States. *Moses*, 496 F.3d at 989 n.9; *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006). Not surprisingly, then, Justice Kennedy's concurrence in *Rapanos* pointed to the Los Angeles River as the prototypical example of an intermittent western river that nevertheless falls within the definition of waters of the United States. 547 U.S. at 769–70.

C. Federal, state, and local governments consider the entire San Gabriel and Los Angeles Rivers to be "rivers"

From the perspective of federal, state and local governments, the existence or absence of channelization does not change the fact that the Los Angeles and San Gabriel Rivers are unquestionably rivers.

For example, guided boating programs are currently active on the Los Angeles River, with the support of the U.S. Army Corps of Engineers, the City of Los Angeles, and the California Mountains Recreation and Conservation Authority. This past summer, well over two thousand people boat recreationally on the Los Angeles River, most of them paying customers on the two boating programs sanctioned by the U.S. Army Corps of Engineers. [9]

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[9] The "Paddle the L.A. River" program is a joint project of these agencies in collaboration with nonprofit partners, including amicus Friends of the Los Angeles River, to provide supervised kayak tours of sections of the L.A. River. Paddle the L.A. River, *at* http://paddlethelariver.com/Paddle_the_LA_River/

In addition, people fish in the Rivers, hike and bicycle alongside them, and enjoy wildlife in the riverbeds. *See, e.g.*, EPA Navigability Determination at 30–34.

The City and County of Los Angeles have worked towards increased public access and use of the Rivers. The City of Los Angeles has issued a River Revitalization Plan that acknowledges the Los Angeles River's central place in the fabric of the City and contemplates restoring it and planning for economic growth through increased access to the River. EPA Navigability Determination at 29–30 (describing the River Revitalization Plan's features, including increased boating opportunities and river-adjacent parkland). The Los Angeles County Department of Public Works has created a master plan for the San Gabriel River that acknowledges the River's ecological and recreational importance. San Gabriel Master Plan at 2-23. The State of California and municipalities adjacent to the Rivers have already established urban parkland along the Rivers.[10] And California recently enacted a law

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about.html. Amicus L.A. River Expeditions also runs a public kayaking program in collaboration with the U.S. Army Corps of Engineers. L.A. River Expeditions, *at* http://www.lariver expeditions.com/page_expeditions.php. L.A. River Expeditions "made it possible for 2,500 people to enjoy the river via canoes and kayaks this past summer." *Id.*

[10] For example, Marsh Park is a three-acre park adjacent to the Los Angeles River in the Elysian Valley neighborhood of Los Angeles. Santa Monica Mountains Conservancy, Marsh Park, *at* http://www.lamountains.com/parks.asp?parkid=669. Santa Monica Mountains Conservancy describes how "[t]he park provides river access, and a stellar view of the Verdugo Hills, as well as picnic grounds, a grassy area, and nature-themed children's play equipment." *Id.*

requiring the Los Angeles County Flood Control District to provide for public use of navigable waterways under the District's control—such as the Los Angeles and San Gabriel Rivers—that are suitable for recreational and educational purposes, where those purposes are not inconsistent with flood control and water conservation. S.B. 1201, 2011–12 Leg., Reg. Sess. (Cal. 2012).[11]

II. The question presented is irrelevant to the outcome in this case because municipal storm sewers, such as the District's, discharge to navigable waters, such as the Los Angeles and San Gabriel Rivers, as a matter of law

The question presented is irrelevant to the determination of liability for two reasons.

First, municipal storm sewers, by definition, discharge into waters of the United States, and not within them, as a matter of law. 40 C.F.R. § 122.26(b)(8). Every municipal storm sewer adds stormwater—including the pollutants contained in stormwater—to those waters of the United States into which it flows. Because it is undisputed that the District's municipal storm sewer flows into the navigable Los Angeles and San Gabriel Rivers, the reference to *Miccosukee Tribe* in the question presented is irrelevant to the District's liability.

Second, the hypothetical scenario described in the question presented—a discharge of pollutants from an outfall within the Rivers—did not, and as a

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[11] *Available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1201-1250/sb_1201_bill_20120828_chaptered.pdf.

legal matter cannot, occur. Federal regulations define the discharge points of a municipal storm sewer into a navigable river as the outfalls. Furthermore, federal regulations exclude the precise situation envisioned in the hypothetical scenario, because the outfall definition specifically excludes "conveyances which connect segments of the same stream or other waters of the United States." *Id.* § 122.26(b)(9).

A. No party disputes that, as a legal and factual matter, urban runoff collected by the District's MS4 flows into navigable waters through outfalls

The District's municipal storm sewers collect urban stormwater runoff and deposit the runoff into the San Gabriel and Los Angeles Rivers. And the District's municipal storm sewer is legally defined under the Clean Water Act and its implementing regulations as a point source that discharges stormwater through one or more outfalls into waters of the United States. No party disputes this factual or legal characterization of the municipal storm sewers at issue in this case. As discussed in Parts II.B and II.C below, these undisputed factual and legal points lead to the inescapable conclusion that the question presented is irrelevant to the outcome of this case.

The District's municipal storm sewer discharges into waters of the United States. The trial court, in its summary of undisputed facts, describes how the District's municipal storm sewer "carries urban runoff from local storm drains to inland rivers . . . ." (App. to Pet. Cert. 106; *see also id.* 56–57 ("[I]t is undisputed that the MS4 collects and channels

stormwater runoff from across the County. That stormwater is channeled in the MS4 to . . . the Los Angeles River [and] the San Gabriel River . . . .").) The District controls the overwhelming majority of this "complicated web" of storm drains: 2,800 miles worth. (App. 106.) The District agrees that its "pipes, drains and other elements of its storm sewer system . . . discharge into the Los Angeles and San Gabriel Rivers . . . ." (Br. of Pet'r 44; *see also* Br. of U.S. 11.)

The District's NPDES Permit confirms that it restricts discharges from the District's storm sewer into receiving waters, including the Los Angeles and San Gabriel Rivers. (*See, e.g.*, Joint App. ("J.A.") 55–56 (describing "discharges of stormwater and urban runoff from municipal separate storm sewer systems . . . [that] flow to water courses . . . and into receiving waters of the Los Angeles Region."); *see also* Br. of Pet'r 8 ("The purpose of the Permit was to regulate stormwater and urban runoff discharges from each of the 86 MS4s operated by the permittees."); J.A. 183 (defining "receiving waters" as those identified in the Los Angeles Region Basin Plan); Basin Plan for the Coastal Watersheds of Los Angeles and Ventura Counties 1-18 (1994) [12] (describing that major surface waters covered by the Plan include both the Los Angeles and San Gabriel Rivers).) The District accepts that the Permit "regulate[s] stormwater and urban runoff discharges from each of the 86 municipal storm sewers operated by the permittees." (Br. of Pet'r 10.)

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[12] *Available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/basin_plan/basin_plan_documentation.shtml.

As Part I explains, both of these "receiving" rivers—the San Gabriel and Los Angeles Rivers—are undisputedly navigable waters of the United States. Thus the District's municipal storm sewer discharges urban stormwater runoff into navigable waters of the United States.

In 1987, Congress created section 1342(p) of the Clean Water Act, confirming that the NPDES permitting program covers municipal storm sewers. Water Quality Act of 1987, Pub. L. No 100-4, 101 Stat. 69 (33 U.S.C. § 1342(p)). By placing municipal storm sewer regulation under section 1342, Congress has identified municipal storm sewers as point sources that have the potential to add pollutants to navigable waters. *Compare* 33 U.S.C. § 1342(p)(2)(C) (requiring NPDES permit for "[a] discharge from a municipal storm sewer system") *with id.* § 1362(12) and (16) (defining "discharge" under the NPDES program). EPA promulgated regulations accordingly. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122, 123 and 124). Not surprisingly, the Permit references both 33 U.S.C. § 1342(p) and 40 C.F.R. § 122.26. (J.A. 71.)

Legally, the point at which municipal stormwater enters waters of the United States is defined as the outfall, otherwise known as the discharge point for the municipal storm sewer system. 40 C.F.R. § 122.26(b)(9). Those points where water flows through the District's municipal storm sewer into the Rivers are thus, by regulatory definition, "outfalls." Both the District and the United States agree that these points are legally

considered outfalls. (*See* Br. of Pet'r 44 ("Petitioner's pipes, drains and other elements of its storm sewer system that discharge to the Los Angeles and San Gabriel Rivers plainly fall within the definition of 'outfall' and are therefore subject to the Clean Water Act's proscriptions."); *id.* 42 n.7 ("The United States, however, correctly concluded that the 'discharges' had already occurred 'from upstream MS4 outfalls' . . . ."); Br. of U.S. 25 ("Petitioner is unquestionably responsible for numerous pollutant discharges at the many outfalls under its control where stormwater is discharged into those rivers."); *accord* Br. for Resp'ts 4, 10.)

Thus, pollution flowing from a municipal storm sewer into navigable waters is always a "discharge" at an outfall.

B. *Miccosukee Tribe* suggested that transferring water between two hydrologically indistinguishable parts of the same water body may not constitute an "addition" to waters of the United States; here, by contrast, there is no dispute that the District's MS4 added to a water of the United States

The Ninth Circuit has found the District liable under the Clean Water Act's NPDES program for discharges of pollutants from its municipal storm sewer system into the Los Angeles and San Gabriel Rivers. "Discharge of pollutants" under Section 402 of the Clean Water Act requires the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Discharge thus requires "addition" by the discharger in three respects: (1) of

pollutants, (2) to waters of the United States, and (3) from a point source.

The question presented invokes *Miccosukee Tribe* in order to question the second element of discharge for its municipal storm sewer. (Pet. Cert. i.) In *Miccosukee Tribe*, this Court suggested that where polluted water was conveyed from one part of a navigable water to another part of that same, hydrologically indistinguishable navigable water, the addition of pollutants may not be an addition to navigable waters. 541 U.S. at 109–110. But as Part II.A. *supra*, explains, the District's municipal storm sewer undisputedly discharges urban stormwater runoff through an outflow into a navigable water. Thus, the second element of the definition is not at issue in this case.[13] As a result, the question

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[13] Neither of the other two elements of "discharge" is in dispute in this case.

There is no doubt that a municipal storm sewer is a point source. A municipal storm sewer is defined as a conveyance, 40 C.F.R. § 122.26(b)(8), and conveyances are a type of point source because they do or may discharge pollutants. 33 U.S.C. § 1362(14); *Miccosukee Tribe*, 541 U.S. at 104–05. More technically, the outfall of the municipal storm sewer is explicitly defined as a point source. 40 C.F.R. § 122.26(9).

In the Ninth Circuit, the District did argue that it was not liable for pollutants merely channeled through its municipal storm sewer because it did not generate those pollutants. (App. 45–46.) The Ninth Circuit correctly rejected this argument because the definition of "discharge of a pollutant" in section 1362(12) of the Clean Water Act includes point sources that merely convey, but do not themselves generate, pollutants. (*Id.* 46–47 (citing *Miccosukee Tribe*, 541 U.S. at 105; *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010).) No party now challenges the main holding of *Miccosukee Tribe*, that conveyance of

presented in this case is, at best, hypothetical, and this Court should therefore dismiss its writ of certiorari.

This Court, in *Miccosukee Tribe*, did not concern itself with the undisputed factual question of whether there was addition of a pollutant. In *Miccosukee Tribe*, the S-9 pump "undisputedly" pumped "water containing pollutants"—namely, "phosphorous-laden water"—from the C-11 canal into the Everglades. 541 U.S. at 102–03 (quoting App. to Pet. for Cert. 28a–29a).

Rather, the Court considered the legal question of whether the movement of water within a single body of water in the Everglades could be considered an addition to navigable waters. *See id.* at 110 ("If one takes a ladle of soup from a pot . . . and pours it back into the pot, one has not 'added' soup or anything else to the pot." (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2001)). The Court suggested that movement of water within a single body of water would not constitute an addition to navigable waters. 541 U.S. at 109–110; *accord S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370,

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pollutants, regardless of origination of those pollutants, can trigger the need for a NPDES permit.

Nor does any party contend that the District's municipal storm sewer did not add pollutants. (*See* App. 20 ("The District admits that it conveys pollutants via the MS4."); App. 45 (noting that the District argued that it channeled pollutants); Br. for Resp'ts 4 ("The [District's] MS4 discharges literally tons of these pollutants to rivers and to the Pacific Ocean every year . . . .").)

381 (2006). This Court, however, held that there was a genuine issue of material fact as to the hydrological relationship of the Everglades and the canal from which the water was pumped, and remanded without completely resolving that dispute. *Id.* at 111–12.

This case presents no similar issue. (*Accord* Br. of Amici Curiae W. Urban Water Coal. 9–10 ("[T]his is an MS4 storm water case that the Court should decide pursuant to the NPDES provisions of the Act applicable to MS4s. This Court need not, and should not, reach the issue of water transfers and its decision in *Miccosukee*.").) In sharp contrast to the water transfers at issue in *Miccosukee Tribe*, a municipal storm sewer is defined in federal regulations as a conveyance that discharges "to waters of the United States." 40 C.F.R. § 122.26(b)(9); *supra* Part II.A. Thus, any pollutants conveyed by a municipal storm sewer necessarily flow into, and constitute an addition to, waters of the United States.

Moreover, Congress' choice to regulate municipal storm sewers using the NPDES permitting scheme should be respected. *See supra* Part II.A. The specific regulation set forth in section 1342(p) makes this case quite unlike *Miccosukee Tribe*. (*Accord* Br. of Amici Curiae W. Urban Water Coal. 5 ("Congress specifically subjected large MS4s to NPDES requirements.") *Miccosukee Tribe* presented genuine confusion as to the status of two sections of water in the Everglades. Congress, of course, did not speak directly to the status of hydrologically indistinguishable water bodies, but it has spoken directly to the status of a municipal storm sewer and a water of the United States. Section 1342(p) leaves

no doubt that municipal storm sewers discharge *into* waters of the United States.

Because all municipal storm sewers add stormwater to navigable waters as a matter of fact and law, a ruling on the question presented is "quite unnecessary in law." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (dismissing a writ of certiorari because the question presented was in fact largely hypothetical). The District has conceded that its municipal storm sewer discharges, through outfalls, into the Los Angeles and San Gabriel Rivers, which are "waters of the United States" in their entirety. The question presented to this Court thus cannot affect the District's liability under the permit for observed exceedances. The question discussed in *Miccosukee Tribe*—whether there has been an addition to navigable waters—is simply absent here.

C. The hypothetical scenario in the question presented cannot occur as a matter of law because a river cannot, as a legal matter, flow into a municipal storm sewer

The District assumed the existence of a legally impossible situation to set up the question presented. The question presented contemplates a hypothetical municipal storm sewer that accepts water from a river and then "discharges" it through an "outfall" within that same navigable river. (Pet. Cert. i.) This situation is legally impossible under the Clean Water Act because it is at odds with the regulatory definitions of municipal storm sewer and outfall. It is factually impossible because the trial court's summary of undisputed facts describe how

the District's municipal storm sewer conveys urban runoff from local storm drains into the Los Angeles and San Gabriel Rivers. *See supra* Part II.A.

The definition of "outfall" specifically excludes the scenario at issue in *Miccosukee Tribe*. As Part II.A explains, municipal storm sewers discharge into navigable waters at outfalls. 40 C.F.R. § 122.26(b)(8) and (b)(9). And an outfall "does not include . . . conveyances which connect segments of the same stream or other waters of the United States." *Id.* § 122.26(b)(9).

By definition then, it is impossible for a municipal storm sewer to accept water from a river or to discharge water from a river through an outfall. Instead, that definition contemplates the conveyance of *urban runoff* through a municipal storm sewer and its subsequent discharge into waters of the United States. *Id.* Thus, there is no such thing as an "outfall" located within a navigable river such as the Los Angeles and San Gabriel Rivers. (*Accord* Br. of Pet'r 43 (arguing that navigable waters fall outside the definition of "outfall").) In contrast, the relevant discussion in *Miccosukee Tribe* deals exclusively with the issue of whether the transfer of water within a single waterbody could be considered an addition into a navigable water. 541 U.S. at 109–110.

Any stormwater that the District has placed into the Rivers got there in the first place because it was already discharged into waters of the United States from the District's storm sewer system through an outfall. (*See* App. 106; *id.* at 56–57; *supra* Part II.A.) The fact that the water later "flows from one portion" of the river "into a lower portion of the same river"

(Pet. Cert. i) is irrelevant to the determination of whether the District discharged pollutants into navigable waters, and thus the record here does not present the issue on which certiorari has been granted. *See Rogers v. United States*, 522 U.S. 252, 253–59 (1998) (Stevens, J., plurality opinion) (dismissing writ of certiorari as improvidently granted where the record did not "fairly present the question that we granted certiorari to address"); *see also id.* at 259 (O'Connor, J., concurring) (concurring because record did not squarely present the issue).

CONCLUSION

Because there is no question that the District's municipal storm sewer system's flow is an addition to a navigable water, the District's attempted application of *Miccosukee Tribe* in its question presented would result in a ruling by this Court that is "quite unnecessary in law." Furthermore, the hypothetical scenario in the question presented it is at odds with the regulatory definitions of municipal storm sewer and outfall and the facts of this case. We therefore respectfully request that this Court dismiss its writ of certiorari as improvidently granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SANTA MONICA BAYKEEPER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR HEAL THE BAY AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Heal the Bay is a not-for-profit organization founded in 1985 to reduce pollution in Santa Monica Bay. It has since grown into one of the most influential environmental groups in California and broadened its mission to protect all of Southern California's coastal waters. It uses research, education, community action, and advocacy to improve the quality and health of oceans, watersheds, and neighborhoods throughout Los Angeles County.

This litigation concerns ongoing stormwater discharges into the Los Angeles watershed, which includes the Santa Monica Bay. The Bay is one of Southern California's primary recreational destinations, accommodating more than 45 million visitors per year. EPA, *Santa Monica Bay*, http://water.epa.gov/type/oceb/nep/programs_smb.cfm (last visited Nov. 2, 2012). But excess stormwater and municipal runoff have substantially degraded it. Indeed, one EPA study found that "beach goers who swim near storm drains are almost 50 percent more likely to contract colds, sore throats, gastroenteritis, and other illnesses than those who swim farther away in cleaner water." *Id.* Heal the Bay has a vital interest in seeing that municipalities in the Los Angeles area comply with their obligation under the Clean Water Act to eliminate stormwater discharge exceedances.

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Petitioner asserts as a "basic principle" underlying the Clean Water Act that "pollution is best addressed at its source" (Pet. Br. 24) and contends that local entities engaged in flood control "effectively exercise no control" over pollutants that flow through their sewer systems (*id.* 26). Petitioner is mistaken. The CWA's basic structure, as well as its express text, requires states and localities to enforce water quality standards and to manage urban runoff and excess stormwater channeled through municipal systems.

Municipalities are, in fact, the entities with the greatest ability to reduce the quantity and increase the quality of urban runoff, a principal contributor to impaired water bodies. The CWA's effluent limitations have, in one sense, been remarkably effective—reducing polluted discharges from industrial sources by ninety percent. But the Act has been less than half as effective at reducing municipal discharges and has failed to achieve meaningful reductions in non-point source pollution, now the single largest contributor to water pollution.

Congress sought to address these limitations on the Act's effectiveness in 1987, expressly designating stormwater runoff from municipal sources as a point source and implementing additional water quality provisions addressing non-point source pollution. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7. By making clear that the Act regulates urban runoff that flows through municipal systems as a point source, Congress has designated the CWA's powerfully-effective effluent limitations and discharge permitting programs as regulatory tools to limit runoff pollution. This decision places on municipalities the responsibility

for controlling pollutants contained in Stormwater, regardless of the pollutants' original source.

Fortunately, municipalities today have far more effective tools at their disposal to manage excess stormwater than they did when Congress enacted the CWA. Advancements in green infrastructure make it feasible and cost-effective for municipalities to exercise substantial control over the flow of pollutants through their systems and into the nation's waters.

This brief shows how the United States has consistently and appropriately placed on states and local governments particular responsibility for ensuring clean waters, and how the 1987 amendments clarify and elevate municipalities' roles in addressing diffuse pollution sources. The importance of municipal responsibility will only increase as the percentage of water pollution attributable to urban runoff continues to grow. As this brief shows, however, green infrastructure projects provide municipalities with the ability to limit runoff pollution by capturing rainwater and either storing it for beneficial re-use or letting it filter back into the ground. Case studies of such projects demonstrate that green infrastructure can be a cost-effective means of reducing pollution and spurring economic revitalization both nationally and in Los Angeles.

ARGUMENT

I. THE CLEAN WATER ACT PLACES SUBSTANTIAL RESPONSIBILITY ON MUNICIPALITIES TO MEET AMBIENT WATER QUALITY STANDARDS AND TO REDUCE WATER POLLUTION

The Los Angeles County Flood Control District asserts as a "basic principle" underlying the CWA that local entities engaged in flood "effectively exercise no

control" over pollutants that flow through their sewer systems. Pet. Br. 26. This claim is incorrect.

The CWA's scope extends beyond "end-of-the-pipe" pollution treatment. Congress, in enacting the CWA, intentionally left in place water quality standards meant to address pollutants on a watershed scale, not just at each point source. 33 U.S.C. §1311(b)(1)(C). Congress then amended the Act to add additional provisions addressing diffuse forms of pollution not amenable to regulation at their sources, such as urban and agricultural runoff. Pub. L. No. 100-4, 101 Stat. 7.

Even the Act's effluent limitations on discharges are not limited solely to addressing pollution at its source. The definition of point source "includes within its reach point sources that do not themselves generate pollutants." *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). The CWA's regulation of excess stormwater, at issue in this case, exemplifies an effluent limitation that applies to dischargers—municipalities—that did not directly generate the contaminants in their polluted discharge. In choosing to regulate stormwater discharges at the municipal level, Congress made an intentional decision that, because pollutants in urban runoff come from such diffuse sources, they can most effectively be regulated on a system-wide level.

Fortunately, municipalities have substantial control over the pollutants that flow into their systems. State and local governments have primary responsibility for establishing water quality standards and even greater discretion in determining how to control nonpoint source pollution. 33 U.S.C. §1329. The 1987 amendments also provide municipalities with two unique tools that allow flexibility in reducing pollution.

First, municipalities may skip end-of-the-pipe stormwater treatment and instead implement pollution controls through a stormwater management program. 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.26(d)(2)(iv). Second, municipalities can obtain stormwater permits on a system-wide or jurisdiction-wide basis. 33 U.S.C. §1342(p)(3)(B)(i); 40 C.F.R. §122.26(a)(3)(ii). These mechanisms fit into a conscious Congressional scheme to give municipalities both the tools and responsibility for enforcing the CWA.

A. Congress Has Consistently Relied On States And Municipalities To Drive Improvements In Water Quality

When Congress enacted the Federal Water Pollution Control Act in 1948, it relied on state and local enforcement efforts to address water pollution. *See Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981); Hines, *Nor Any Drop To Drink*, 52 Iowa L. Rev. 799, 810 (1957). The 1948 Act authorized Federal agencies to support water research and encourage technological development. Water Pollution Control Act, Pub. L. No. 80-845, §1, 62 Stat. 1155, 1155 (1948). The Act's most substantial portion created a series of loans for municipal treatment plants, recognizing that addressing water pollution depends on the concerted effort of cities and local governments. *Id.* §§5, 7, 62 Stat. at 1158, 1159. Congress substantially expanded the municipal program eight years later. Water Pollution Control Act Amendments of 1956, Pub. L. No. 84-660, §6, 70 Stat. 498, 502-503.

The 1965 Water Quality Act likewise relied on state and local action, this time giving states responsibility for setting water quality standards for interstate waters. Pub. L. No. 89-234, 79 Stat. 903. The program

provided latitude to develop projects specifically addressing runoff and other diffuse forms of pollution. *Id.* §2, 79 Stat. at 903-904; *see* S. Rep. No. 92-414, at 1461-1462 (1971). The following year, Congress again substantially increased funding for the municipal construction grant program. *See* Clean Water Restoration Act of 1966, Pub. L. No. 89-753, §205, 80 Stat. 1246, 1250.

B. The Clean Water Act Employed Effluent Limitations As A Supplement To, Rather Than A Replacement For, Municipal Responsibility

In enacting the CWA, Congress established a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The most powerful mechanism Congress introduced was §301(a), which creates a default prohibition on the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." *Id.* §§1311(a), 1362(12). EPA, in conjunction with states, administers §301(a) by issuing National Pollutant Discharge Elimination System (NPDES) permits containing "effluent limitations" that restrict polluted discharges. *Id.* §1311(e).

The NPDES permitting scheme gives states substantial authority to control pollution. The EPA can delegate NPDES permitting responsibilities to a state, provided the state adopts a permit program substantially equivalent to the federal program. 33 U.S.C. §1342(b). The CWA also "retained and expanded" Congress's pre-existing scheme of state-administered water quality standards. Andreen, *Water Quality Today*, 55 Ala. L. Rev. 537, 548 (2004); *see, e.g.*, S. Rep. No. 92-414, at 1461-1462 (explaining that Congress intended effluent limitations and water quality standards to co-

exist). Meanwhile, the municipal grant program "fairly exploded" with the Act's passage because of increased funding for long-needed projects and the stringency of the soon-to-be-imposed effluent limitations. 55 Ala. L. Rev. at 552.

C. The 1987 Amendments, By Regulating Discharges Of Stormwater As Point Sources, Make Municipalities The Critical Actor In Reducing Water Pollution From Urban Runoff

Shortly after Congress enacted the CWA, EPA promulgated regulations exempting from the NPDES permitting requirements municipal storm sewer discharges consisting solely of stormwater. 38 Fed. Reg. 18,000-18,004 (July 5, 1973). The D.C. Circuit struck down that exemption, holding that stormwater discharges are a "discharge of any pollutant" under the Act and that EPA lacked the authority to exempt covered discharges from the statute's permitting requirements. *NRDC, Inc.* v. *Costle*, 568 F.2d 1369, 1383 (D.C. Cir. 1977).

During the next 15 years, EPA made 5 more unsuccessful attempts to adopt effective rules governing stormwater discharges. *See Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999). In 1987, Congress intervened, creating a statutory scheme for regulating stormwater discharges. Pub. L. No. 100-4, §405, 101 Stat. at 69-71; *see NRDC, Inc.* v. *EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992) ("Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987." (footnotes omitted)).

In implementing this statutory scheme, Congress made a conscious decision to impose the permitting requirement for urban runoff at the municipal level. "Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare')..., Congress put the NPDES permitting requirements at the municipal level to ease the burden of administering the program." Pet. App. 31 (citation omitted). This decision reflected a clear Congressional intent that municipalities should be the actor primarily responsible for reducing urban runoff, even though municipalities themselves do not generate all of the pollutants in stormwater.

In return for heightened responsibility under the 1987 amendments, Congress gave municipalities two flexible tools for implementing their NPDES permits not available to other dischargers.

First, municipalities may omit end-of-the-pipe stormwater treatment and instead implement pollution controls through a stormwater management program. 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.26(d)(2)(iv). These programs allow municipalities to reduce stormwater discharges in the first instance, such as through wetland protection, best management practices, floodplain controls, and implementing green infrastructure. *See* 40 C.F.R. §122.26(d)(1)(v). Specifically, the Act mandates that municipalities "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B)(iii); 40 C.F.R. §122.26(d)(2)(iv).

Second, municipalities can obtain stormwater permits on a system-wide or jurisdiction-wide basis. 33 U.S.C. §1342(p)(3)(B)(i); 40 C.F.R. §122.26(a)(3)(ii). For example, a group of cities may apply for a single permit to govern their interconnected stormwater systems or municipal separate sewer systems (MS4). 40 C.F.R. §122.26(a)(3)(ii), (d). Allowing permits to issue on a system-wide basis permits coordination of MS4 activities and spreads the burden for monitoring, development, and implementation among the parties to the permit. Minan, *Municipal Storm Water Permitting in California*, 40 San Diego L. Rev. 245, 250 (2003). The provision also obviates the need to identify each point source in a municipal system and excuses municipalities from the burdensome process of providing data for each point source. 55 Fed. Reg. 47,990, 48,046 (Nov. 16, 1990).

States and local governments are also responsible for implementing the CWA's provisions addressing non-point source pollution. Section 319 requires states to identify waters impaired by non-point source pollution and then to develop management plans, subject to EPA review, to address the problem. 33 U.S.C. §1329. States have discretion to employ a number of non-regulatory programs, including technical assistance, education, training, and demonstration projects, to implement the provision. *Id.* §1329(b)(2)(B).

In short, by enacting the 1987 amendments, Congress gave municipalities substantial responsibility for stormwater regulation. By regulating as a point source stormwater and urban runoff that flows through municipal systems and discharges into U.S. waters, the amendments make municipalities responsible for controlling diffuse sources of pollution within their drainage area. But Congress simultaneously empowered

municipalities with flexible tools to achieve such regulation, including the ability to use management practices and technologies such as green infrastructure to reduce the environmental impact of urban runoff.

II. MANAGING STORMWATER AND URBAN RUNOFF IS INCREASINGLY CRITICAL TO PROTECTING THE NATION'S WATER SUPPLY

Stormwater runoff is a "major source of water quality impairment nationwide," 64 Fed. Reg. 68,722, 68,726 (Dec. 8, 1999), and "is the chief source of coastal and surface water pollution in California," Cal. Water Res. Control Bd. Resolution No. 2003-0013.

Stormwater's role in water pollution will only continue to grow. Unless cities begin to adopt green infrastructure practices, increased urbanization will cause additional runoff containing higher pollutant concentrations. And even if stormwater volume declines in absolute terms, its relative significance will continue to increase. As effluent limitations continue to drive down the volume of pollution from conventional, industrial sources, more diffuse pollution sources, such as urban runoff, will be responsible for a larger share of the pollutants flowing into our nation's waters. The 1987 amendments encourage municipalities to address this problem by regulating stormwater as a point source, thus bringing the most effective mechanism in the CWA—§301's effluent limitations—to bear on a water pollution problem that the nation has so far had limited success in addressing.

A. Stormwater And Urban Runoff Are Already Among The Largest Sources Of Impairment Of Our Nation's Waters

Stormwater discharges are a leading cause of impaired water quality. *See NRDC* v. *EPA*, 966 F.2d at 1295. The effect of stormwater runoff is "comparable to, if not greater than, contamination from industrial and sewage sources." *Environmental Def. Ctr., Inc.* v. *EPA*, 344 F.3d 832, 840 (9th Cir. 2003) (internal quotation marks omitted).

Both the high quantity and the low quality of stormwater runoff cause substantial environmental harm. With increased urbanization comes a corresponding increase in the amount of impervious surfaces, such as parking lots and rooftops, that significantly increase the volume of stormwater that collects as runoff during rains.

It is easy to underestimate how much even a single parking lot can contribute to urban runoff. Increases in impervious surfaces can increase a 100-year flood event into a five-year event at only twenty-five percent impervious cover.[2] Klein, *Urbanization and Stream Quality Impairment*, 15 Water Resources Bull. 948, 953 (1979). An example by T.R. Schueler helps explains this effect. Because most of the rainwater is able to penetrate into the ground, a one-inch rainstorm on a one acre meadow creates only about 218 cubic feet (1631 gallons) of runoff. Schueler, *The Importance of Imperviousness*, 1 Watershed Protection Tech. 100, 100

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[2] A 100-year flood event is the flood water level expected every 100 years on average. Similarly, a 5-year flood event is the flood level expected every 5 years on average.

(1994). By contrast, the same storm on a one acre parking lot would produce 3,450 cubic feet (25,808 gallons) of runoff. *Id.* Meanwhile, the flow velocity of the runoff from the parking lot would be more than four times greater. *Id.* at 100-101.

Large runoff volumes, even if unpolluted, can cause environmental harm. Runoff can produce high rates of erosion, siltation, and sedimentation, and widen, deepen, or alter the path of receiving waterways, negatively affecting the receiving streams' physical integrity. *See* EPA, *Urbanization and Streams* (1997); Arnold & Gibbons, *Impervious Surface Coverage*, 62 J. Am. Planning Ass'n 243, 245 (1996).

But stormwater runoff is rarely unpolluted. "Draining stormwater picks up a variety of contaminants as it filters through soil and over pavement on its way to the sewers." *Environmental Def. Ctr.*, 344 F.3d at 840. Stormwater carries suspended metals, sediments, algae-promoting nutrients, floatable trash, used motor oil, raw sewage, pesticides, and other contaminants into rivers, lakes, and estuaries. *Id.* at 840-841; *see also* 64 Fed. Reg. at 68,724, 68,727-68,728. Three quarters of states cite urban stormwater runoff as a major cause of waterbody impairment. *Environmental Def. Ctr.*, 344 F.3d at 841. In fact, urban runoff poses a problem on par with, if not greater than, pollution from industrial sources. "[U]rban runoff from residential, commercial and industrial areas produces a quantity of suspended solids and chemical oxygen demand that is equal to or greater than that from secondary treatment sewage plants." *NRDC* v. *EPA*, 966 F.2d at 1295 n.3; *see* 55 Fed. Reg. at 47,991.

Stormwater pollution poses a particular problem for California. The California Legislature passed the

Storm Water Enforcement Act in 1998, 1998 Cal. Stat. 998, and in 2001, added an additional section requiring the State Water Resources Control Board to develop minimum stormwater monitoring and sampling requirements, 2001 Cal. Stat. 492.

The Los Angeles municipal area "faces the largest concentration of such pollution" in California. Cal. Water Res. Control Bd. Resolution No. 2003-0013. Stormwater runoff in Los Angeles has caused significant bacterial contamination in nearby streams and routinely leads to beach closures. *Id.* Runoff is "increasingly being recognized as a source of fecal bacteria and public health concerns at swimming beaches." Noble et al., *Storm Effects on Regional Beach Quality Along the Southern California Shoreline*, 1 J. Water & Health 23, 23 (2003). Illness rates increase dramatically when swimming at beaches near urban runoff outlets. Haile et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, 10 Epidemiology 355, 359-363 (1999). In fact, researchers at the University of Southern California have detected poliovirus, cocksackle virus, and hepatitis A virus in the urban runoff draining into California beach water. Calverley, *Researchers Probe Dangers in Urban Runoff*, USC News, Sept. 20, 1999.

B. Effective Stormwater And Runoff Management Will Become Increasingly Important

The CWA has, in one sense, been a remarkable success. Scholars have described its effluent limitations as "America's most successful pollution control program." Houck, *Recent Developments Under the Clean Water Act NPDES Program* 325 (1991), *cited in* Percival et al., *Environmental Regulation* (2d ed. 1996). Its regulatory and financial assistance programs

have succeeded in significantly reducing the direct discharge of pollutants into the nation's water. *See* EPA, *Environmental Investments* 10-5 to 10-6 (1990). The result has been at least a ninety percent reduction in industrial wastewater discharge rates. Council on Environmental Quality, *Environmental Quality 1994-95*, at 14 (1997).

On the other hand, the CWA's efforts to regulate stormwater, urban runoff, and other diffuse pollution sources have largely failed. Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control*, 20 Harv. Envtl. L. Rev. 515, 526-528 (1996). The §319 program "has not made great strides in controlling pollution from non-point sources." Percival et al., *Environmental Regulation* 619-624, 630-633 (5th ed. 2003).

Two results follow from this asymmetry:

First, the failure to meaningfully address diffuse pollution sources has prevented the United States from reaching the Congressional objectives set out in the Act. The CWA's objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Congress recognized that meeting "the goals of this section" required "the control of both point and nonpoint sources of pollution." *Id.* §1251(a)(7). The United States has so far failed to achieve this goal and cannot do so without major reductions in diffuse pollution sources.

Second, as diffuse pollution sources continue to increase while industrial wastewater discharges continue to decline, the relative gains available by addressing diffuse pollution sources become ever greater. It will become increasingly easier and more cost-effective to achieve improvements in water quality by controlling urban runoff and excess stormwater than by attempt-

ing to achieve incremental improvements from industrial point sources.

C. Municipalities Play A Uniquely Critical Role In The Nation's Continued Effort To Reduce Water Pollution

Cities and other municipalities are now uniquely situated to continue the nation's efforts to reduce water pollution.

First, larger water quality gains can be made at the municipal level than by increasing regulation of industrial point sources. While industrial wastewater discharge rates have dropped ninety percent, the reduction in municipal wastewater discharges has been only about half of that. Houck, *TMDLs IV*, 29 Envtl. L. Rep. 10469, 10469 (1999); *Environmental Quality 1994-95*, at 14. Many municipal systems continue to experience sewer overflows when it rains. EPA, *1996 Clean Water Needs Survey* 7 (1997); NRDC, *When It Rains ... It Pollutes* (1992). Meanwhile, most municipal systems are aging and in need of substantial renovation. *See* EPA, *The Clean Water and Drinking Water Infrastructure Gap Analysis* 14-15 (2002); EPA, *Financing America's Clean Water Since 1987*, at 15 (2001); Water Infrastructure Network, *Clean and Safe Water for the 21st Century* ES-1 (2000).

Second, municipal action now provides the primary regulatory control in reducing the impact of diffuse pollution sources. Although §319 directly addresses nonpoint pollution sources, its control measures are minimal. That section requires states to identify which waters in the state do not meet water quality standards, but provides no enforcement of those standards. *See* 33 U.S.C. §1329.

Congress's decision to impose a permitting requirement for urban runoff at the municipal level creates a powerful mechanism to address pollution that otherwise might be addressed only in the Act's treatment of non-point sources. By enacting the 1987 amendments, Congress made clear that the CWA's highly-effective effluent limitations restrictions apply to diffuse sources of pollution that make their way into municipal systems.

This Court should not entertain the District's suggestion that it "effectively exercise[s] no control" over the pollutants that flow through its sewer systems. Pet. Br. 24. The Court has already held that the definition of point source "includes within its reach point sources that do not themselves generate pollutants." *South Fla. Water Mgmt. Dist.*, 541 U.S. at 105. And Congress has required municipalities to exercise such control, affording them the necessary regulatory tools to do so. *See supra* p. 9.

One management mechanism in particular, green infrastructure, offers municipalities a cost-effective way to reduce the pollutant volume they discharge into U.S. waters.

III. Advancements In Green Infrastructure Make It Possible For Municipalities To Exercise Substantial Control Over The Flow Of Pollutants Through Their Systems And Into The Nation's Water Supply

Since the 1987 amendments to the CWA, municipalities have been the entities with the greatest ability to address urban runoff. Green infrastructure can both reduce the quantity and increase the quality of stormwater entering our nation's waters. Green infrastructure provides municipalities with a cost-effective and

efficient means to limit runoff pollution by capturing rainwater and either storing it or letting it filter back into the ground.

A. Green Infrastructure Addresses Excess Stormwater And Urban Runoff By Managing Rainwater Where It Falls, Reducing Discharges Into Waterbodies

Several cities across the United States have begun implementing green infrastructure projects to control stormwater volume and runoff pollution. The technology used by these projects has already resulted in dramatic reductions in runoff volumes and pollutant discharges.

1. Green infrastructure relies on natural processes to efficiently reduce runoff volume and the pollutant concentration of that runoff

Green infrastructure uses natural functions such as passive filtration, treatment, and retention, allowing soil, trees, and plants to do the work of costlier traditional "grey" alternatives. These natural processes include infiltration, biofiltration and biouptake, and evapotranspiration, each of which is briefly described below.

Infiltration is the process by which water moves naturally from the ground's surface into the soil. *See* Community Conservation Solutions, *Upper L.A. Watershed, Phase II*, at ES-3 (2011) (*L.A. River*). Infiltration can either be shallow, remaining close to the surface or deep, percolating through the soil and entering aquifers and ground water supplies. California Water and Land Use Partnership, *How Urbanization Affects the Water Cycle* 1-2, *available at* http://www.coastal.ca.gov/nps/watercyclefacts.pdf (last visited Nov.

5, 2012). While impervious surfaces such as asphalt do not permit water to absorb and filter through to the soil beneath, several green infrastructure options do, including permeable pavement, vegetated areas, and tree plantings. Pervious surfaces such as these reduce runoff volume and prevent polluted stormwater from entering sewer systems in the first place. EPA, *Pervious Concrete Pavement*, http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=137&minmeasure=5 (last visited Nov. 4, 2012).

Biofiltration is the process by which vegetation and soil filter pollutants and solids out of water. *L.A. River* ES-3. Similarly, *biouptake* processes occur when plants and other organisms metabolize phosphorous or nitrogen compounds, such as ammonia, absorbing these pollutants for use as energy sources. *Id.* Green infrastructure options that rely on biofiltration and biouptake to purify polluted runoff naturally include bioswales and biostrips, sand filters, wetlands, riparian zones, and green roofs. By directing stormwater flow to and through biofiltration and biouptake features, runoff pollution is naturally and efficiently reduced without the need for conventional treatment facilities. *See* Center for Neighborhood Technology, *The Value of Green Infrastructure* 8-9 (2010) (*CNT*).

Evapotranspiration occurs when water returns naturally to the atmosphere, either by evaporation or the transpiration of water by plants. *L.A. River* ES-3. Urbanization of once-vegetated areas cuts natural evapotranspiration rates drastically, leading to increased runoff volumes, lower oxygen content in the air, and higher carbon dioxide concentrations. *See* NRDC, *Rooftops to Rivers II*, at 7, 15 (2011) (*Rooftops*); NRC, *Urban Stormwater Management in the United*

States 131-132 (2008) (*NRC*). Reforestation and re-greening help restore this process to a more natural balance. *Rooftops* 13; *NRC* 309.

2. Green infrastructure reduces runoff in several ways, including infiltration, purification, capture, and storage

Traditional grey infrastructure used to control runoff volume, including deep storage tunnel systems and the like, take decades to build and can cost hundreds of millions (or even billions) of dollars. *Rooftops* 17. Despite their cost, such individual grey controls cannot handle all urban runoff needs. *Id.* Green infrastructure generally works better and costs less.

a. Green options such as permeable pavement and bioswales restore nature's ability to absorb and filter runoff through permeable surfaces

Cities across the country have successfully employed green infrastructure projects to control runoff pollution. Because the primary means of reducing pollution from stormwater runoff is to reduce the total runoff volume, most green infrastructure programs use options that focus on improving infiltration and biofiltration processes. *Rooftops* 15.

Permeable pavement. The greatest single contributor to urban runoff has been replacing open land and naturally pervious surfaces with impermeable surfaces like concrete. *Rooftops* 7. To combat this problem, cities including Chicago and Milwaukee have begun replacing concrete sidewalks, alleys, and other low-traffic surfaces with permeable paving. *See, e.g.*, *Rooftops, Chicago* 2-3. Permeable paving is made from layers of materials that infiltrate and detain stormwater,

providing time for the runoff to either evaporate or percolate to the soil underneath, while at the same time filtering out solid, heavy metal, and hydrocarbon pollutants (Figure 1). *New York State Stormwater Management Design Manual* 5-114 to 5-115 (2010) (*NYSMDM*).

Figure 1: Porous Pavement Detail

Because of these physical characteristics, cities have used permeable pavement as an efficient, effective, and aesthetic alternative to asphalt. Under the Greening Chicago's Alleys program, for example, the city decided to use both pervious concrete and paver slabs to reconstruct alleyways (Figure 2). *Rooftops, Chicago* 2.

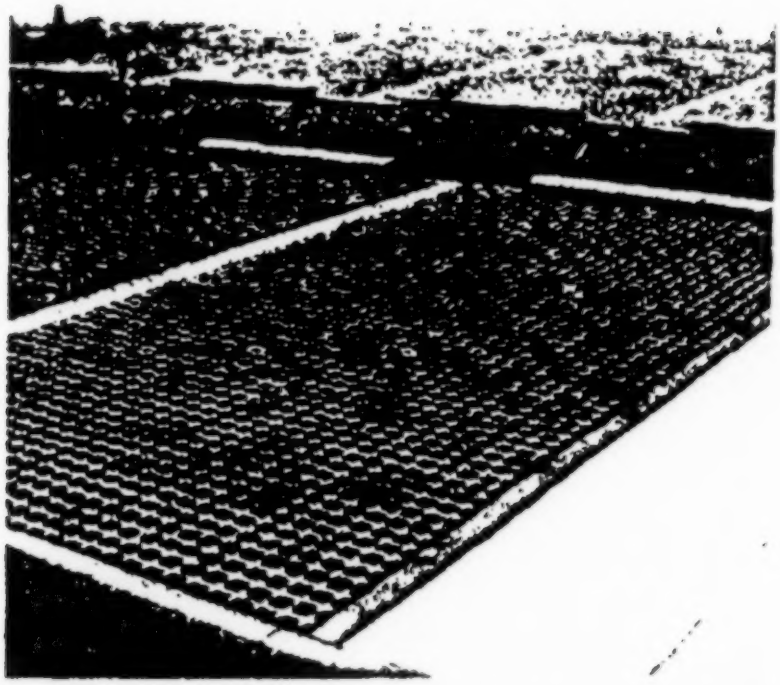

Figure 2: Permeable Pavers in Parking Lot

The city found that pervious pavement reduced basement flooding and provided a cost-effective alternative to connecting the city's 13,000 alleys to its sewer mains. *Rooftops, Chicago* 2-3. Chicago has since expanded its greening program to include over 215,000 square feet of parking lots and lanes, sidewalks, bike lanes, and pedestrian plazas. *Id.* at 3.

Bioswales. Other cities, such as Washington, D.C. and Portland, have focused on using bioswales to reduce runoff pollution and volume. These swales are troughs filled with mixtures of soil, compost, and plants (Figure 3). *NYSMDM* 5-58 to 5-60.

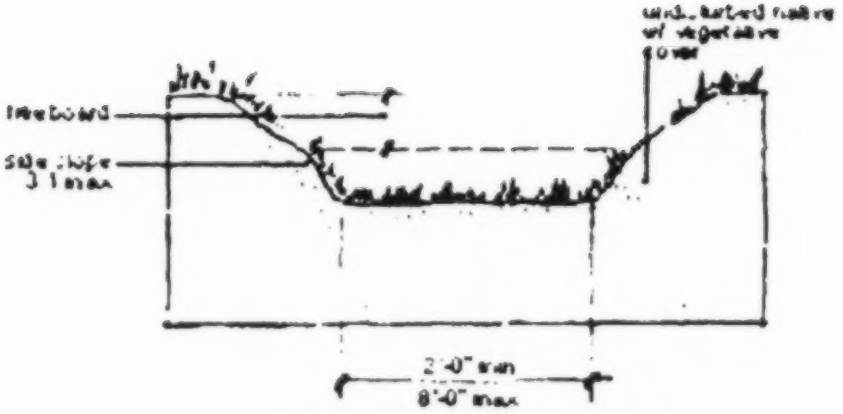

Figure 3: Bioswale Cross Section

The swale's shape collects and diverts stormwater runoff (Figure 4), permitting water to filter into the soil while the plants simultaneously remove silt, pollutants, and bacteria. *NYSMDM* 5-58 to 5-60.

Figure 4: Bioswale Collecting Runoff in Seattle

Portland first installed a green-engineered bioswale in 1996, resulting in a fifty-percent reduction in runoff pollution entering the Willamette River. Liptan & Murase, *Watergardens as Stormwater Infrastructure in Portland, Oregon* 28, *in Handbook of Water Sensitive Planning and Design* (2002). Portland has since installed successful swales and vegetated curb extensions throughout the city. *Rooftops, Portland* 3-4.

Swales are particularly effective and flexible options for reducing runoff pollution because each aspect of the swale can be adapted to the area's particular needs. For instance, planners can improve the soil substrate to assist in biota development and to provide for root development and water retention. Oregon Department of Environmental Quality, *Biofilters* 14 (2003) (*Biofilters*). Including dense vegetation to increase runoff retention time generally removes more pollutants. Planners can also adjust the amounts and types of clay and the soil pH to reduce turbidity or remove heavy metal pollutants such as copper, cadmium, and mercury. *Biofilters* 4. They can modify the soil's biological content to fix and remove nitrogen compounds or, alternatively, to convert and retain nutrients, improving drought resistance. *Biofilters* 5.

Bioswale plants have varying abilities to capture and filter specific pollutants, as well as tolerate moisture or drought. For instance, sedge and rush grasses develop dense base and root systems that filter out most solid and sedimentary waste from runoff, while perennial sod-forming grasses planted on the sides of a swale prevent erosion and remove nitrogen compounds. *Biofilters* 6-10. Cattails can remove approximately eighty percent of phosphorous pollution from stormwater, and starwort and purslane excel at absorbing toxic organic compounds. *Biofilters* 8.

Wetland restoration and man-made wetlands. Cities can also manage stormwater by restoring existing wetlands and constructing new ones. New York City developed the Staten Island Bluebelt, containing thousands of acres of restored wetlands. *Rooftops, New York* 2. These wetlands saved the city $80 million in infrastructure costs between 1997 and 2007 and significantly reduced residential flooding. *Id.*

Man-made wetlands filter and retain stormwater for longer periods than swales. *Biofilters* 39. The ideal location and soil must discourage quick drainage but still support the plants and organisms used to seed the area. *Biofilters* 39-40. Designed wetlands must also support algae, which digests incoming pollutants and solids and transforms them into plant nutrients. *Biofilters* 11. New York, Portland, Philadelphia, and Minneapolis have all successfully implemented man-made wetlands. *See, e.g., Rooftops, Philadelphia* 4.

Rain gardens. Rain gardens, or retention cells, are generally easy to construct and require little maintenance, making them ideal residential green infrastructure options. *See NYSMDM* 5-76; Prince George's County (Md.) Department of Environmental Resources, *Bioretention Manual* 21 (2007). Designed like mini-bioswales, rain gardens manage and treat small amounts of stormwater running from impervious surfaces. *NYSMDM* 5-76. They generally can be found near downspouts or in parking lots, within a slight depression, allowing water to infiltrate to the drainage layers beneath. *NYSMDM* 5-76 to 5-77. Because rain gardens rarely carry standing water, they support a wider variety of native plants, shrubs, and flowers, making them an aesthetically-pleasing runoff control option. *NYSMDM* 5-82 to 5-83.

Green Roofs. Scandinavian countries have used green roofs for hundreds of years as an insulation means, but U.S. cities recently have begun installing them to absorb rainwater long enough to permit evapotranspiration. *NYSMDM* 5-86.

Figure 5: Green Roof in Washington, D.C.

Chicago is an exemplar. Its green roof system covers approximately 5.5 million square feet of previously impervious surface. *Rooftops, Chicago* 2. The city requires all new buildings to have at least a partial roof garden and provides a variety of incentives to encourage private implementation. *Id.* Portland and Washington, D.C. have similar requirements and incentives available, with similar success. Because the demand for green roofs has increased dramatically over the past decade, the upfront installation costs have decreased to about $15 per square foot. *Id.*

b. Water harvesting techniques reduce runoff volume while providing an efficient and low cost water source

While many green options focus on filtration and purification, others require little structural or landscaping changes, instead focusing on *capturing* rainwater and runoff. Water capture techniques offer a different means of reducing runoff, even where surfaces do not permit infiltration, while simultaneously increasing local water supply. NRDC, *A Clear Blue Future* 20-21 (2009) (*Clear Blue*). Water harvesting alone can reduce runoff volumes by fifty to seventy-five percent. *Id.*

Downspout disconnection. Generally, water harvesting techniques channel stormwater running off of roofs and involve disconnecting gutter downspouts from a sewer standpipe to prevent stormwater from directly entering the sewer system. *See CNT* 12. Even if the redirected stormwater does not flow into a capture system, disconnecting the downspout itself greatly reduces runoff volume and the risk that sewers will overflow during storms. *Id.*; *Rooftops, Portland* 3. The flow can then be directed to areas amenable to surface infiltration.

Figure 6: Downspout Connected to Rain Barrel

Rain barrels and cisterns. A more flexible approach involves harvesting this runoff using rain barrels (Figure 6) and cisterns. *NYSMDM* 5-106. The runoff can then be used for non-potable uses such as irrigation, washing cars, and even flushing toilets. For example, a building in downtown Seattle captures water from its rooftop and uses it to supply over sixty percent of the water used to flush toilets and irrigate the property, saving the building 1.4 million gallons of potable water a year. *Clear Blue* 20.

On average, forty to sixty percent of the total impervious surface of a residential property is comprised of rooftop. Capturing and using rooftop runoff thus presents significant benefits. *Clear Blue* 20. For example, residential irrigation alone consumes approximately 7 billion gallons of water daily, amounting to a third of all residential water use. *CNT* 12. Harvesting rooftop rainwater could drastically reduce this source

of demand for potable water, offsetting the cost of and energy required to import water from other sources. *See Clear Blue* 20.

3. Green infrastructure effectively reduces stormwater runoff volumes, especially when compared to grey alternatives

Although each individual green infrastructure option offers different levels of runoff reduction and purification, these techniques are at least as effective at reducing stormwater runoff as conventional grey options, and generally are less expensive over time.

- *Downspout disconnect with rain barrel*: Among the simplest green infrastructure practices, downspout disconnects directing runoff to rain barrels cost as little as $50 to $200, but the setup can capture 0.4 inches of rain from a 500 square foot roof, or 125 gallons of stormwater per storm. *See* Milwaukee Metropolitan Sewerage District, *The Application of Stormwater Runoff Reduction Best Management Practices in Metropolitan Milwaukee* 7 (2007).

- *Green roofs*: Green roofs can retain forty to eighty percent of annual precipitation, depending on the soil depth and plant varieties used, at a current installation cost of $15 per square foot. *Id.*

- *Tree plantings*: Each planted tree intercepts many gallons of water a year. For example, a 22 foot-tall crabapple tree, with a 21 foot spread, can reduce runoff by 292 gallons a year, while a 47 foot-tall hackberry tree with a 37 foot spread can intercept over 2000 gallons annually. *CNT* 18. Trees also sequester air pollu-

tion such as carbon, sulfur dioxide, ozone. *CNT* 34, 40.

- *Permeable paving*: Depending on rainfall intensity, pervious pavement can infiltrate eighty to one hundred percent of stormwater. *CNT* at 19-20. In Chicago, for example, with an average annual rainfall of 36 inches, converting a 10,000 square foot conventional parking lot to permeable pavement could reduce runoff by 179,000 to 224,000 gallons annually.

B. Green Infrastructure Projects Provide Municipalities With A Technologically Feasible And Cost-Effective Means To Limit Runoff Pollution By Capturing And Filtering Rainwater

The EPA's 2008 *Clean Watersheds Needs Survey* conservatively estimated that the nation would need almost $300 billion to fund twenty years of capital projects to maintain, repair, and expand the nation's aging stormwater and sewer infrastructure. *See* EPA, *Clean Watersheds Needs Survey* 2-1 (2008). This total includes $187.9 billion for repairing and replacing existing wastewater treatment systems and sewer infrastructure and $42.3 billion for expanding stormwater management capacity to control runoff (including $17.4 billion for green infrastructure projects). *Id.* at 2-6, 2-18.

Some of these costs are avoidable. While green infrastructure represents a substantial investment, it generally costs less than traditional stormwater management options and provides a better time-valued investment.

1. Municipalities can directly implement green infrastructure using several funding sources

To fund green infrastructure projects, cities and states have used various financing options, including bond issues, general fund allocations, and state and federal loans. *Rooftops* 26. For example, Los Angeles voters passed a $500 million bond initiative in 2004 to fund water conservation, flood protection, and water quality projects. *Rooftops* 23.

Many cities have also implemented stormwater utility fees charged as part of standard waterworks utility bills. *Rooftops* 23. Such fees have several benefits. First, because they are generally based on impervious surface area, owners are charged fairly for their individual contributions to stormwater runoff. *Id.* Second, they can be levied on any property, even if it has no water or sewer meter, including empty paved lots or properties with onsite septic tanks. *Id.* Finally, many cities also offer credits for properties that replace impervious surfaces with permeable ones or implement projects that manage any runoff onsite, *e.g.*, cisterns or rain gardens, creating a financial incentive to reduce runoff. *Rooftops* 24.

2. Municipalities can spur green infrastructure development by creating incentives for private implementation

Municipal direct investment will not completely address urban runoff. But cities can also encourage private use of green options. One approach, mentioned above, reduces stormwater utility fees for properties installing onsite runoff management and has increased public awareness of and participation in green initia-

tives. *Rooftops* 23; EPA, *Managing Wet Weather with Green Infrastructure* 2-3 (2009).

Chicago provides numerous effective incentives for residential and commercial property owners and developers. For instance, the city offers subsidies of up to fifty percent for the cost of rain barrels, trees, and native plants for water capture and retention efforts. *Rooftops, Chicago* 3. The city also uses green permits to encourage or require commercial developers to install permeable pavement where possible. *Id.*

New York City, meanwhile, provides millions of dollars in grants to private groups and individuals to support installing bioswales, rain gardens, permeable pavement, green roofs, and rooftop farms. *Rooftops, New York* 4. New York has also adopted new zoning laws requiring parking lots to incorporate rain gardens and other bioretention landscaping and prohibiting paving over lawns in residential areas. *Id.* Property owners can receive a tax credit up to $100,000 for installing and maintaining green roofs. *Id.* Furthermore, New York's Department of Environmental Protection has established several private-public partnerships to share the long-term development costs for green projects that retain and manage runoff onsite. The program relieves demand on the city's combined sewer overflow system, saving $139-$418 million over a twenty-year period. *Id.*

Portland requires all city-owned buildings to install green roofs and provides them with several incentives to meet that requirement. *Rooftops, Portland* 4. Portland also offers grants and educational assistance to property owners to install green roofs within the city limits. *Id.*

In 2006, Seattle developed the first green development regulation program in the country—the Green Factor Program—which scores private development on its use of green landscaping features to control runoff and beautify publicly visible spaces. *Rooftops, Seattle* 3. Developers can attain additional bonuses for planting food gardens and drought-resistant plants and for capturing rainwater. *Id.*

3. Municipalities can save money by implementing stormwater management plans relying largely on green infrastructure

Ample evidence suggests that investing in green infrastructure can significantly reduce capital expenditures related to wastewater management while reaping the same or greater benefits as expanding municipal systems. In New York, Staten Island's Bluebelt project saved the city approximately $80 million in costs compared to traditional options. *Rooftops, New York* 2. This program's success has inspired New York to pursue additional green infrastructure development within the city, including plans to substitute green options for grey infrastructure modifications mandated by a 2011 consent decree with the state. The substitutions will save the city about $1.4 billion and forestall the need for two planned detention tunnels that would cost an additional $2 billion. *Id.* at 4.

Portland expects similar results. The city's Tabor to the River program will install 500 green facilities, plant trees, repair about forty miles of sewer pipes, and work with property owners to install green options for reducing or capturing runoff. *Rooftops, Portland* 4. While this green program will cost approximately $86 million, a purely grey option would have cost $58 million more. *Id.*

Washington, D.C., meanwhile, estimates that a moderate greening effort throughout the city, increasing tree cover and green roof implementation thirty-five to forty percent, would reduce runoff volume by 300 million gallons, saving the city from $1.4 to $5.1 million per year in pumping and treatment costs alone. *Rooftops, D.C.* 3. A more extensive program including rain barrels, permeable pavement, and curbside bioretention would reduce runoff by more than four billion gallons. *Id.*

C. Green Infrastructure Improvements Provide Important Secondary Benefits Such As Flood Preventing And Increased Economic Development

Green infrastructure does more than simply manage stormwater. It has significant secondary value, benefiting conservation efforts and improving community livability.

First, green infrastructure options decrease the need for long-term capital investments in grey infrastructure repair, replacement, and expansion. *CNT* 21-23. By directly removing runoff volume from municipal sewer systems, green infrastructure options can significantly reduce the burden on these systems.

Second, green infrastructure options reduce flood risk, whether from overburdened sewer systems or otherwise. A 2005 FEMA study found that poor stormwater management caused twenty-five percent of the economic damage from floods, *Rooftops* 21, amounting to approximately $1.5 billion annually, *see* EPA, *Green Infrastructure Case Studies* 10 (2010) (*GICS*) (not including hurricane flood damage). Green infrastructure options can significantly reduce the risk of flood damage by mimicking natural processes, instead

of diverting runoff from urban areas to overburdened streams and waterways.

When urban surfaces can better absorb and retain stormwater, the localized flood risk decreases dramatically. For example, Chicago's Green Alleys program found that (1) paving over alleyways had increased flood damage to surrounding properties, but (2) connecting these alleys to the city's sewer system would be both prohibitively expensive and counterproductive (actually increasing the risk of basement flooding). *Rooftops, Chicago* 3. Instead, the city opted to replace impervious asphalt with permeable paving. *Id.* This approach saved money and reduced flooding risk. Similarly, Portland used vegetated curb extensions to reduce peak storm flow rates by eighty-eight percent and green roofs to decrease storm runoff by eight-five to one hundred percent—both more than sufficient to prevent local basement flooding. *Rooftops, Portland* 3-5.

Third, green infrastructure investments increasing plant cover improve air quality, moderate temperatures, and help conserve water. *Rooftops, Portland* 6-7. As trees and plants breathe, they remove carbon dioxide from the air, replace depleted oxygen concentrations, and return water to the air, reducing temperatures. *Id.* This process is especially useful in urban environments, which usually suffer from a heat island effect. *CNT* 47.

Fourth, by creating a more plentiful water supply, green infrastructure reduces a city's energy needs and its carbon footprint. *CNT* 26-47. Green infrastructure can also provide direct energy savings. For instance, green roofs reduce energy consumption more than conventional roofing insulation. *Id.* at 26-30.

Fifth, municipalities can reduce urban blight by investing in green infrastructure options and providing appropriate incentive programs for private development. As described *infra*, Philadelphia has turned areas formerly littered with abandoned lots into thriving communities by directing private development to these areas, tied with green infrastructure requirements. *Rooftops, Philadelphia* 4; Philadelphia Combined Sewer Overflow Long Term Plan Update, *Supplemental Documentation Volume 2, Triple Bottom Line Analysis* (2009) (*TBLA*).

Finally, when municipalities invest in green infrastructure options, they create good local jobs. And while traditional wastewater construction requires specially-trained workers, many green projects can hire minimally skilled workers with little prior experience, providing jobs for those most likely to be unemployed. *TBLA* 4-4, 4-5.

D. Philadelphia's Ambitious Program To Implement Green Infrastructure Provides A Compelling Example For Other Municipalities

Striving to be the "#1 Green City in America," Philadelphia has become a national benchmark for successful green infrastructure implementation. *See* McKinstry et al., *Unpave a Parking Lot and Put Up a Paradise*, 42 Envtl. L. Rep. 10824, 10824 (2012) (*Unpave*). The city began its program in the 1990s, but substantially expanded it in 2008 in response to a consent decree with the EPA and the Pennsylvania Department of Environmental Protection.

The Green City, Clean Waters Program ambitiously commits the city to $2.5 billion in spending over the next 25 years, but it offers an expected savings of $8 billion when compared to grey options alone. *Un-*

pave 10824. As of August 2011, the city has already implemented "91 stormwater tree trenches, 33 downspout planters, 24 rain gardens, 12 porous paving projects, 9 stormwater bump-outs, 9 swales, 7 stormwater planters, 6 infiltration trenches[], 3 stormwater wetlands, and 1 stormwater basin." *Rooftops, Philadelphia* 4. The city's success in planning and implementing Green City's initial stages demonstrate that even large scale green development programs are feasible and replicable.

Two separate sewer systems serve Philadelphia: sixty percent of the system is a combined sewer, while the remaining forty percent is an MS4. Together these systems contain approximately 3,000 miles of piping, 79,000 sewer inlets, 160 combined sewer outfalls, and 450 stormwater outfalls. *GICS* 49. In order to comply with a consent decree, the city created a long term control plan and assessed a variety of gray and green options based on efficiency and cost. *Unpave* 10828. Determining that green infrastructure could reduce capital funding requirements by seventy-five to eighty percent, the city opted for a plan focused largely on green landscaping options. *Id.* The city also concluded that a green approach would improve quality of life for residents and visitors, and fit into the city's existing programs to provide residents with access to healthy neighborhoods and open recreational spaces. *Id.*

Approximately forty-five percent of the city's impervious surfaces are on public land, mostly streets and sidewalks. *Unpave* 10828. Mitigating the impact of these impervious surfaces will require Philadelphia to develop over 9,000 greened acres. *Id.* To achieve that goal, Philadelphia has begun implementing several projects, including installing "[bio]swales with trees and grass dividing bike lanes or sidewalks, [and] tree plant-

ers with large infiltration pits," and replacing impermeable surfaces with permeable ones. *Id.*

The city has also capitalized on Green City to educate the public, providing grants to schools to install green infrastructure. *Unpave* 10829. The Nebinger School, for instance, has used these grants to install rain gardens, porous play surfaces, and stormwater planters that manage runoff from the school and neighboring streets. *Id.*

Green City also engages the private sector. For example, permitting rules adopted in 2006 require that all new development or redevelopment programs covering over 15,000 square feet must incorporate green infiltration or water-capture options for managing the first inch of rainfall onsite. *Rooftops, Philadelphia* 2. As an incentive, the city provides a fast-track stormwater management permit review program for certain projects. The estimated effect of this program will be to keep an estimated one billion gallons of runoff out of the sewer systems annually. *Id.* at 3.

The program provides several other incentives to property owners. Low-interest loan programs assist residents and other private entities to finance green projects on private land. *Unpave* 10829. The city also issues a property tax credit for installing and maintaining green roofs covering at least fifty percent of a building's surface. *Rooftops, Philadelphia* 3.

The city encourages further participation by using green infrastructure demonstration projects. For instance, Philadelphia has created fourteen Model Neighborhoods (financed by state revolving funds), each retrofitting four city blocks with rain gardens, tree trenches, sidewalk planters, rain barrels, and permeable surfaces. *Rooftops, Philadelphia* 3. Not only have

these installations raised public awareness and support for further expansion of green programs, but they have provided the city with opportunities to develop and refine designs. *Id.*

Green City integrates with other sustainability projects, such as Greenworks Philadelphia, aimed at increasing the number of open green spaces throughout Philadelphia and creating recreational spaces within ten minutes for seventy-five percent of the city's residents. *Unpave* 10830. This program will result in an additional 500 acres of greened public space, bike lanes, and pedestrian corridors, and will "simultaneously enhance recreation, reduce automobile traffic and its emission of greenhouse gases and conventional pollutants, reduce urban heat island effect, and implement green infrastructure to control stormwater." *Id.*

By incorporating and integrating green infrastructure projects with other capital programs, the city can keep marginal costs low and draw on a variety of municipal, state, and federal funding sources—not just those devoted to stormwater management. For instance, Philadelphia plans on incorporating green infrastructure projects into street repair projects eligible for federal transportation funding. *Unpave* 10830. It also has formed public-private partnerships to install geothermal heat transfer units and green infiltration basins under parking lots, streets, and playing fields. *Id.* This approach efficiently fulfills two capital projects at one time while allowing access to federal energy tax credits and using private partners to subsidize capital costs. *Id.*

In addition to the expected stormwater runoff benefits, the Green City program also should provide numerous social, economic, and environmental benefits.

In 2009, the city commissioned a "triple bottom line analysis" to quantify the value of these secondary benefits. *TBLA* 3-1. For instance, several of Philadelphia's green infrastructure projects would restore and improve streams and riparian buffers to reduce erosion and sedimentary runoff. *Id.* at 4-1 to 4-2. As a result, the city expects an increase in creekside recreation such as jogging, biking, walking, and picnicking. The TBLA estimates an increase of approximately 350 million recreational outings over a forty-year period, with a monetized present value (in 2009 U.S. dollars) of $520 million. TBLA 4-2

The TBLA also estimates that residential properties across the city will increase in value by approximately $575 million, representing the value associated with increased aesthetics from landscaping-based green infrastructure installations. *TBLA* 4-2. The city could also expect to see a social services savings of $125 million over 40 years from poverty reduction spurred by green infrastructure jobs creation for lower-skilled local workers. *TBLA* 4-5.

Because greener spaces provide greater shade and insulation and reduce wastewater treatment needs, the TBLA expects a corresponding reduction in carbon dioxide, sulfur dioxide, and nitrogen oxide emissions. These reductions have a monetized present value of $101 million, or $12 per each metric ton of emissions. *TBLA* 4-6. The city could save an additional $130 million over 40 years by preventing respiratory illnesses (*e.g.*, asthma), premature death, and heart attacks. *TBLA* 4-7.

E. Modeling Demonstrates That Los Angeles County Can Use Green Infrastructure To Significantly Reduce Urban Runoff

Although eliminating or substantially reducing stormwater runoff in Los Angeles would require concerted municipal effort, it is far more feasible than the District suggests.

First, as summarized above, many cities have already successfully developed substantial green infrastructure. These programs can provide a model for Los Angeles.

Second, community groups have completed much of the initial investigation into public spaces appropriate for green infrastructure projects, providing the County with information regarding hundreds of appropriate locations to install green infrastructure. For instance, in March 2008, Community Conservancy Solutions published a Phase I review of land within the County's watersheds, including the Los Angeles River and Santa Monica Bay watersheds. *See* Community Conservancy International, *The Green Solution Project Executive Summary and Maps* ES-7 (2008). The review determined that over 6116 average suitable acres can host green infrastructure within the Upper and Lower Los Angeles River Watersheds. *Id.* ES-9. The Santa Monica Bay watersheds contain approximately 1459 suitable acres. *Id.*

The CCS released the second phase analyses of the Santa Monica Bay Watershed in February 2011 and the Upper Los Angeles River Watershed in March 2011. *See* Community Conservation Solutions, *Santa Monica Bay Watershed, Phase II* (2011) (*Santa Monica*); *L.A. River*. Both watersheds cover large swaths of area in which impervious surface ranges from fifty to one hun-

dred percent. *See, e.g.*, *Santa Monica* 19. The review found that even on dry days, a total of 46.2 million gallons of runoff is generated everyday, generally from sprinklers, yards, car washing, and hosing down driveways. *L.A. River* ES-5. At this rate, the every-day runoff from the watershed would fill the Rose Bowl in less than two days. *Id.*

The reports identified over 500 potential green infrastructure project sites. *Santa Monica* ES-6; *L.A. River* ES-7. With the results of these studies in hand, and access to empirical data from other municipalities, Los Angeles has the tools it needs to implement green infrastructure as an effective and inexpensive solution to manage its urban runoff problem.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-460

IN THE
Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether there can be a "discharge" from an "outfall" under the Clean Water Act, when water flows from one portion of a river that is a navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, and into a lower portion of the same river, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians* that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act.

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INTEREST OF THE *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 3500 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

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[1] No counsel of a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Both parties have provided written consent, on file with the clerk, to the filing of briefs in support of either, or neither, party.

IMLA has a record of filing *amicus* briefs in this Court when issues arise that are important to cities, communities, and individuals they represent. Members of this Court have recognized the strength and importance of those briefs by favorably citing them on core issues involving federalism and state power. *See Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133, 1135 n.3, 1136 (2009) (citing and quoting the brief of the IMLA); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 781 n.9 (2005) (Stevens, J. dissenting) (citing the brief of the IMLA).

IMLA respectfully submits this brief to highlight the importance of the Ninth Circuit's ruling to local governments. Increasingly frequent severe weather and rapid urbanization has forced local governments to protect their citizens by expanding their flood control systems. Beyond the legal and political challenges typically encountered in these projects, the current economic climate has made these vital services increasingly difficult to fund. The effects of the Ninth Circuit's decision will exacerbate these problems and prevent state and local governments from protecting their citizens.

IMLA is uniquely situated to address issues of state land use. The Association represents community leaders from politically, economically and geographically diverse municipalities around the country. The communities that these organizations represent all share an interest in properly utilizing land and water resources to develop land for use and for the protection of their populace.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's redefinition of "point source" and "discharge" conflicts with the definitions this Court established in *Miccosukee*. The Ninth Circuit's rule effectively makes MS4 operators with improved waterways strictly liable for any "inter-body" discharge, even if the discharge occurred upstream and outside of the operator's control. If upheld, this would be a major change in the law that would significantly affect municipalities' ability to plan and build flood control systems within MS4s. Municipalities rely on clear and consistent rules and liability when constructing flood control systems. These systems are expensive public works projects requiring extensive planning and development over long periods of time with cooperation from – and the

political will of – federal, state and local governments. Compounding these challenges is the ever increasing need for flood control as weather patterns change and urban populations grow. In addition to making new flood control systems more difficult to construct, the Ninth Circuit's decision will result in increased liability for existing flood control systems. This liability could not have been predicted at the time the systems were built. More and more municipalities will be forced to make the difficult choice between avoiding disastrous flooding and incurring potentially ruinous liability from the future discharge of others. The Supreme Court should reverse the Ninth Circuit's decision and reaffirm *Miccosukee*, so that municipalities will not be liable for pollution merely because they made flood control improvements within existing bodies of water.

ARGUMENT

I. The Ninth Circuit's Decision is Inconsistent with this Court's Decision in *Miccosukee*, Which Governs the Question Presented in This Case.

The Ninth Circuit's treatment of the improved portion of a waterway as a "point source" that "discharges" into the unimproved portion, *see Natural Res. Def. Council v. L.A. Cnty.*, 673 F.3d 880, 900 (9th Cir. 2011), conflicts with this Court's prior treatment of improved waterways. Finding a "discharge of any pollutant" under the Clean Water Act requires an initial determination that a pollutant was added to a "navigable water" from a "point source." 33 U.S.C. § 1362(12). Only then do National Pollutant Elimination Discharge System ("NPDES") permitting requirements apply. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342. Where water is transferred from one portion of an artificially-divided body to another portion of that same body, this Court has demanded a demonstration of "meaningful[] distinct[ion]" between these portions before a "discharge" could be found. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004).

Manmade improvements that convey water between two portions of a single body of water do not constitute a "discharge of a pollutant" when the different portions of the body of water are not distinct. *See id.* at 105, 109-110. In *Miccosukee*, this Court was asked to determine whether a channelized flow of water in the Everglades was a discharge from a point source subject to NPDES permitting requirements. *See id.* at 99, 104. Historically, much of the land of South Florida consisted of wetlands whose ground and surface waters flowed across the land in an unchanneled and uniform sheet. *Id.* at 99. In 1948, Congress authorized the construction of a comprehensive flood control system for South Florida. *Id.* at 100.

Miccosukee concerned the outfall of a pumping station that pumped water across a levee in order to drain canals on one side of the levee and impound the water on the other side. *See id.* at 100-101. The pump in question drained water from a canal system abutting an urban, agricultural, and residential area of more than 100,000 people. *Id.* at 100. When rain fell, contaminated surface runoff from this area flowed into a canal network where it was pumped into a wetland that served as an impoundment. *Id.* at 100-101. This Court considered

whether a discharge of a pollutant occurred when contaminated water was pumped from the canal system into the wetland. *Id.* at 102. This Court determined that when the source and receiving waters are ". . . simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *Id.* at 109. "[I]f one takes a ladle from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) (internal quotation marks omitted). Where water is simply transferred within a single water body, there is no "addition" of a pollutant and subsequently no "discharge" under the Clean Water Act. *Compare id. with* 33 U.S.C. § 1362(12). Thus, the existence of a "discharge of a pollutant" hinged on a factual determination of whether the source and receiving waters were one body of water or "meaningfully distinct water bodies." *Miccosukee*, 541 U.S. at 112.

Compared to the flood control improvements discussed in *Miccosukee*, there is not even an "artificial division" in the rivers at issue here, much less a meaningful distinction between the MS4

waterway portions and those portions upstream from the MS4. The drainage canals in *Miccosukee* acted much like municipal MS4s by channeling stormwater running off of urban, agricultural, and residential land. *See id.* at 101. But unlike the waters in *Miccosukee*, the Los Angeles River has not been diverted or altered. The Los Angeles River was merely channelized for flood control. U.S. Envtl. Prot. Agency, Region 9, *Special Case Evaluation Regarding Status of the Los Angeles River, California, as a Traditional Navigable Water* 8 (July 1, 2010), *available at* http://www.epa.gov/region9/mediacenter/LA-river/LASpecialCaseLetterandEvaluation.pdf. This Court's "meaningful distinction" requirement should therefore apply with even more force. Nonetheless, the Ninth Circuit ignored the holding of *Miccosukee*, and applied a different rule that has vastly different consequences for L.A. County Flood Control District and other MS4s across the country.

II. The Ninth Circuit's Rule Unfairly Subjects Municipalities to Unpredictable and Increasing Liability, Making It Difficult to Plan, Finance, and Manage Flood Control Systems.

A. *Flood Control Systems Are Increasingly Common and Necessary to Protect Life and Property.*

Rivers in Southern California are not the only rivers that could be impacted if all flood control improvements were susceptible to liability under NPDES permitting requirements. America has a long history of improving waterways: between the beginning of the 19th century and the mid-20th century, nearly 320,000 kilometers, or 200,000 miles, of waterways were modified. *See* Andrew Brookes, *Channelized Rivers: Perspectives for Environmental Management* 9 (1988). Flood control methods can take a number of forms, including resectioning, realignment, embankments, flood walls, and culverts. *Id.*; *see also* Brookes at 25.

The city of Pittsburgh stands as an example of the importance of developing robust flood control systems. Pittsburgh's flood control system consists of a network of 16 reservoirs built by the U.S. Army Corps of Engineers. *See* "Flood Damage Reduction," U.S. Army Corps of Engineers Pittsburgh District, http://www.lrp.usace.army.mil/org/who.htm#flood (last updated Dec. 2, 2011). These reservoirs were authorized by the Omnibus Flood Control Act of 1936, 33 U.S.C. § 701 et. seq. (2012). The United States Army Corps of Engineers estimates that these reservoirs, combined with 42 other control systems, have prevented more than $12.6 billion dollars in property damage since their construction. *See* U.S. Army Corps of Engineers Pittsburgh District, *supra*.

Unfortunately for Pittsburgh's residents in March 1936, authorization for these flood control systems was still under debate when floodwaters crested to 46 feet in the city's business district. Len Barcousky, *The Historic St. Patrick's Day Flood of 1936: two eyewitness accounts*, Pittsburgh Post-Gazette, Mar. 17, 2011, available at http://www.post-gazette.com/stories/local/region/the-historic-st-patricks-day-flood-of-1936-two-eyewitness-accounts-287411/?p=3 (last visited Mar.

29, 2012). Public transit and electrical services shut down, and the city suffered an estimated $412,000,000 in property damage in 2012 dollars.[2] *See* "City Water Fails; 45 Dead, 350 Hurt," Pittsburgh Sun-Telegraph, March 20, 1936. *Available at* http://www.clpgh.org/exhibit/neighborhoods/downtown/down_n41.html (last visited September 12, 2012). Since construction of the Corps of Engineers system, Pittsburgh has not suffered from flooding on the scale seen in 1936: in 1996, floodwaters were an estimated 9.7 feet lower than they would have been without the system, and in 2004 flooding was 7.7 feet lower. *See* U.S. Army Corps of Engineers Pittsburgh District, *supra*.

Though far less dramatic than the 1936 flood in Pittsburgh, unusually intense rainfall and inadequate storm sewer capacity combined to flood Washington, D.C.'s Federal Triangle in June 2006. See Report on Flooding and Stormwater in Washington, D.C., Nat'l Capital Planning Comm'n, Report on Flooding and Stormwater in Washington, D.C. at 4-5, (Jan. 2008), available at

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[2] The Sun-Telegraph estimated $25,000,000 in 1936 dollars. The above figure is adjusted for inflation using the Consumer Price Index. *See* CPI Inflation Calculator, Bureau of Labor Statistics, http://www.bls.gov/data/inflation_calculator.htm.

http://www.ncpc.gov/DocumentDepot/Publications/FloodReport2008.pdf. The "extensive flooding shut down operations at four key federal office buildings—IRS Headquarters, the Commerce Department, the Justice Department, and the National Archives." *Id.* at 4. As a result of this flooding, the District of Columbia embarked on an extensive project to update the District's inadequate sewer, drainage, and levee systems. *See id.* Construction of these improvements is critical not only to protecting private and government property but also the nation's heritage, as "many priceless monuments, museums, and national structures are located in areas likely to flood." *Id.* at 9. Planning for these improvements only considered the impact of NPDES requirements on the construction process, however. *Id.* at 10-11. New District liabilities for pollution discharged through stormwater could place these planned improvements on hold as the National Capital Planning Commission takes the additional costs into account.

B. *Flood Control Systems Are Major Public Works Projects that Cannot Be Easily Modified to Adjust to Changing Legal Rules.*

Flood control does not take place in a vacuum. Like any policy set by municipal governments, it can be both politically and legally fraught. Each waterway is unique, and the selection of the most practical and economical flood control methods is an in-depth process. It requires local knowledge and local experts working in collaboration with federal and state authorities, a lengthy political process, and extensive public funding.

For example, despite the dire need for effective flood control in New Orleans, it took the Army Corps of Engineers thirty-eight years just to begin construction on flood walls, and an additional six to complete them. *See* J.D. Rogers, *Development of the New Orleans Flood Protection System Prior to Hurricane Katrina*, 134 J. Geotechnical and Geoenvironment Engineering 602, 614-15 (May 1, 2008). The federal government became involved with flood control in New Orleans in 1955, and five years later, the Army Corps of Engineers proposed constructing tidal gates and pumps on Lake Pontchartrain. *See id.* This proposal was

successfully opposed by citizen groups concerned about how the Corps would coordinate with the local Water & Sewer Board. *Id.* at 615.

In 1961, the Army Corps proposed a system of earthen dikes and tidal gates instead. *Id.* The proposal was too expensive to attract political support, and funding was never approved. *Id.* The Corps then proposed building tidal gates alone, but it was enjoined from doing so in 1977 because it did not consider the environmental impact of alternative flood-control schemes. *Id.* Finally, construction of flood walls began in 1993. *Id.* It was finished six years later, but due to incorrect elevation measurements, the walls were too short to stop Hurricane Katrina from devastatingly flooding much of the city. *Id.*

Flood control is a process that evolves over many years, and thus requires flexibility. In Alameda County, California, flood-control policy has continually responded to shifting political, economic, and environmental needs for the past sixty years. Flood control began in 1949, when the Alameda County Flood Control and Water Conservation District was formed. Zone 7 Water Agency, *supra*. In 1966, the District adopted its first Master Plan for flood control; it built a major reservoir, Lake Del

Valle, two years later. *Id.* The many arroyos running across the county continued to prove problematic, so the District supplemented its early flood control with an Arroyo Management Plan in 1985. *Id.* Major flooding struck in 1998, and the District overhauled its Master Plan a year later. *Id.* In 2001, the District began "stakeholder and regulatory coordination," seeking greater input into its flood-control policies from community and environmental groups. *Id.* That spirit of dialogue around environmental needs found new life in 2007, when the District established StreamWISE, a program to keep adapting flood control in the years to come. *Id.*

Whether it is Pittsburgh, Washington, New Orleans, Alameda County, or any other urban locality in America, it takes a long time and plenty of adaptability to changing politics to control flooding. MS4 and other flood-control systems represent the investment of decades of political effort and planning. The Ninth Circuit's ruling, by changing the applicable rules and expanding the potential for liability for pollution flowing through improved areas, has rendered the potential long-term cost of flood control for the municipality uncertain at best, and vastly more expensive at worst.

C. *The Ninth Circuit's Ruling Creates Difficulty and Uncertainty in the Funding Process for MS4 and Flood-Control Programs, While Increasing Municipal Liability.*

The Ninth Circuit's ruling introduces further uncertainty and complications into the political process, resulting in difficulty obtaining funding by increasing municipal liability. "Municipalities are clearly authorized to perform the regulatory oversight functions required by the MS4 program," but this authority comes with great restrictions and much liability. *See* New York State Dep't of Envtl. Conservation, Div. of Water, Draft, *Municipal Separate Storm Sewer System (MS4) Funding Document 5* (June 2007), *available at:* http://www.dec.ny.gov/docs/water_pdf/funddocdraft1.pdf. Municipalities are both authorized *and obligated* to oversee MS4 programs. They must pay "to oversee the actions taken by third parties that provide input into the municipal stormwater system," and they are liable when they do not meet federal standards in doing so. *Id.* at 8.

But while municipalities bear the burden of supporting MS4 flood control systems, the Ninth

Circuit's ruling undermines the debt funding procedures that most municipalities use to fund this vital infrastructure. Debt-funding mechanisms used by municipalities include bonds, federal grants, and inter-governmental loans. Nat'l Ass'n of Flood and Stormwater Mgmt. Agencies, Guidance for Municipal Stormwater Funding ES-1, ES-2 (Jan. 2006), *available at*: http://www.nafsma.org/pdf/Guidance%20Manual%20Version%202X.pdf. Public debt allows municipalities to undertake extensive, expensive programs in a shorter time period than would be possible if the municipality used a "pay as you go" method of funding. *See id.* at 2-2. However, to be effective, debt funding requires the municipality to present a detailed plan that describes the costs, benefits, needs, and measures it is undertaking years in advance. *See id.* at 2-3, 4-14. The Ninth Circuit's ruling would create uncertainty about costs, thereby reducing municipalities' access to bonds, because those backing the bond would have to be concerned about unpredictably rising levels of pollutants.

By increasing uncertainty, the Ninth Circuit makes debt funding more difficult. Without recourse to debt funding, municipalities would be forced to rely on the money they can scrape together from

other sources. New York shows just some of the difficulties that a municipality can face when trying to meet the costs of funding a flood-control program. In that state, "the only source for the payment of these costs is the general fund of the municipality." New York State Dep't of Envtl. Conservation, Div. of Water, *Municipal Separate Storm Sewer System (MS4) Funding Document*, 6 (June 2007), (last visited Sept. 12, 2009), http://www.dec.ny.gov/docs/water_pdf/funddocdraft1.pdf. In New York, "the only source for the payment of these costs is the general fund of the municipality." *See id.* Municipalities have tried to find alternative schemes for financing MS4 and other flood-control programs, but "[i]n several cases, even where the law is silent, courts have found that the financing scheme in other statutes was intended . . . to be exclusive . . . ." *Id.* at 19. In other cases, the courts have held "that some of the alternative financing schemes have amounted to a tax. According to the state constitution, a tax needs explicit state legislative authorization . . . ." *Id.* States already place many limits on the ability of municipalities to fund their liabilities; the Ninth Circuit's holding will only exacerbate this problem, especially for poorer areas which do not "have the

resources on [their] own to support the costs." *See id.* at 23.

The MS4s at issue in this case are part of a flood control system; as in other cities across the country, the channelized improvements operated by Los Angeles County are necessary to prevent catastrophic losses in the event of a natural disaster. The Ninth Circuit's ruling in this case places cities in the unenviable position of either having to assume liability for pollutants flowing through the MS4s they maintain, regardless of whether the pollution originated in the municipality, or to forego developing flood control systems that protect lives and property and facilitate growth and expansion.

In the end, the MS4 permit holder is the only entity liable for point source discharges within its system. So, even where there is adequate financial assistance for construction on the front end, when, 20 years after construction, increasing contamination of a continuous body of water leads – under the Ninth Circuit's view – to liability, the last municipality within the improved area is the only entity responsible for paying the fine, and it is often the least likely to have the financial flexibility to pay such an unpredicted cost.

D. *Increasing Urbanization, and Extreme Weather Events, Make Flood Control More Important for Municipalities Than Ever Before.*

The past century has seen marked demographic shifts, with the urban population of the United States jumping from 45.6% of the population in 1910 to 80.7% of the population as of 2010. *Compare* United States Census Bureau, *Population: 1790 to 1990*, *available at* http://www.census.gov/population/www/censusdata/files/table-4.pdf (showing historical population trends from 1790 through 1990), *with* United States Census Bureau, *2010 Census Urban and Rural Classification and Urban Area Criteria*, *available at* http://www.census.gov/geo/www/ua/2010urbanruralclass.html (showing the percentage of the American population living in urban areas as of 2010). As the population of the United States continues to move from rural to urban areas, municipalities must make greater investments in their flood control systems.

For example, Las Vegas is protected by a $1.6. billion system of "83 detention basins and 550 miles of channels and underground storm drains built

since the mid-1980s." Keith Rogers, *Flood Control a Success*, Las Vegas Review-Journal (last updated Dec. 29, 2010, 11:24 PM), http://www.lvrj.com/news/flood-control-a-success-112541109.html. Despite these extensive controls, Las Vegas' Clark County Flood Control District has proposed numerous additional flood control conveyances, and has several projects under construction. Regional Flood Control District, *Flood View Advanced Map* (last viewed Sept. 12, 2012, 6:05 PM), http://acequia.ccrfcd.org/fvadvanced/fvadvanced.aspx. http://www.ccrfcd.org/aboutus.htm (follow "FloodView Advanced" hyperlink; then follow "FloodView Advanced" icon). These projects have coincided with dramatic increases Las Vegas' population, which has grown by twenty-two percent from 2000 to 2010. Press Release, United States Census Bureau, U.S. Census Bureau Delivers 2010 Census Population Totals (Feb. 24, 2011), *available at* http://2010.census.gov/news/releases/operations/cb11-cn51.html.

In addition to pressure from larger urban populations, municipalities must handle greater volumes of water due to increasingly common extreme weather events .*See* U.S. Global Change Research Program, *Global Climate Change Impacts*

in the United States 27 (2009) *available at* http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf; *see also* Letter from American Water Works Ass'n et al. to U.S. Congress, *Water Resource Impacts of Climate Change* (May 20, 2008) *available at*: http://www.nafsma.org/pdf/ClimateChangeStatement.pdf. Overall precipitation has increased five percent over the last fifty years and heavy precipitation is more common even in places where the total amount of annual rainfall has decreased. *See* U.S. Global Climate Change Research Program, *supra* at 18. When it rains, it pours: heavy downpours accounted for the majority of the observed increase in precipitation nationwide over the past 50 years. *See id.* at 32. Storms that previously occurred once every two decades are predicted to occur as often as every four years by the end of this century. *Id.* Heavy storms will also become heavier. Once-in-two-decade storms are predicted to be ten to twenty-five percent heavier by the end of the century than similarly frequent storms are now. *Id.*

The effects of this trend can already be seen. "The amount of rain falling in the heaviest downpours has increased approximately twenty

percent on average in the last century." *Id.* at 27. For example, as described in Part II.A above, a storm inundated significant portions of Washington, D.C. in 2006, flooding I.R.S. Headquarters, the Commerce Department, the Justice Department, and the National Archives. *See* Nat'l Capital Planning Comm'n, *Report on Flooding and Stormwater in Washington, DC* 4 (2008), *available at* http://www.ncpc.gov/DocumentDepot/Publications/FloodReport2008.pdf. Beyond increased precipitation, sea level rise will challenge municipalities located near the ocean. By the end of the century, the U.S. Geological Survey forecasts that Chesapeake Bay sea levels will rise one foot, leaving the Washington in danger of storm surges that would "make the Jefferson Memorial an island and flood the National Mall up to the Reflecting Pool." *Id.* at 3.

More people living in urban areas combined with an increase in rainfall overall and an increase in heavy rains in particular can only mean one thing: more people will need flood control systems like the one upon which Los Angeles County relies. These systems, in turn, are going to be more taxed to deal with the weather that comes their way. *See* Letter from American Water Works Ass'n, *supra*.

In sum, this is not just a ruling affecting a single idiosyncratic municipal flood control system. Flood control through channelization and other improvements is common, and likely to be increasingly necessary. It is expensive, and a significant part of a municipality's operations.

The Ninth Circuit's expansion of what is considered a point source discharge is a change in the law that potentially subjects municipalities to *per se* liability for pollutants discovered in a flood control system, a ruling that has tremendous implications for municipal decisions regarding lengthy and costly public works projects. This ruling will only affect more and more municipalities in the future. Accordingly, this Court should reverse the Ninth Circuit's decision and reaffirm its ruling in *Miccosukee*.

CONCLUSION

The decision of the court of Ninth Circuit should be reversed.

Respectfully submitted,

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September 13, 2012

AMICUS CURIAE BRIEF

SUPREME COURT

No. 11-460

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S QUESTION PRESENTED

The Clean Water Act regulates the addition of pollutants to the navigable waters of the United States, including pollutants discharged from municipal storm sewer systems. 33 U.S.C. § 1342(p).

The question presented is:

When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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B. EPA regulations provide state permitting authorities considerable flexibility in designing the monitoring provisions for a particular MS4 permit. 13

C. Neither the Clean Water Act nor governing regulations limit permit drafters' use of in-stream, mass-emissions monitoring stations. 14

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici law professors, listed below, teach and write in the areas of administrative and environmental law and take a professional interest in the development of this Court's jurisprudence in those areas. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.[1]

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[1] The parties have consented to the filing of this brief in letters on file with the Clerk's office. Amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than Amici made a monetary contribution to the preparation or submission of the brief.

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SUMMARY OF ARGUMENT

Petitioner's assertion that this case implicates *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), both overstates the holding in *Miccosukee* and significantly mischaracterizes the issues in this case. In *Miccosukee*, this Court construed Clean Water Act language that triggers the National Pollutant Discharge Elimination System (NPDES) permitting requirement, concluding that the requirement does not apply to water transfers unless they result in the movement of pollutants between "meaningfully distinct" water bodies. *Id.* at 112. But Petitioner concedes, as it must, that the large municipal separate storm sewer system (MS4) at issue here discharges pollutants to navigable waters of the United States and is subject to the NPDES permitting requirement. This case therefore raises no issue under *Miccosukee*.

Rather, the case presents a question of permit interpretation, set in a context of significant deference to reasoned agency decisionmaking. Petitioner and Respondents offer very different readings of the compliance provisions in Petitioner's MS4 NPDES permit. Petitioner claims the permit employs representative, in-stream, mass-emissions monitoring stations only to evaluate permit effectiveness and to assess the conditions of receiving waters. Respondents argue the permit also relies on data from the monitoring stations to establish individual dischargers' liability for permit violations.

Amici express no view on that narrow disagreement but write to explain the broader administrative context. As a general matter, the

individualized terms of MS4 NPDES permits merit deference as the products of a lawful, reasonable, complex, and interactive permitting process. Further, permit drafters enjoy ample authority to design individualized compliance regimes for each MS4 NPDES permit. Finally, of most relevance here, that discretion extends to choices about how to employ mass-emissions monitoring stations—as tools to assess individual permittees' compliance, or instead merely as indicators of overall permit performance.

The only issue in this case, therefore, is how the drafters of Petitioner's permit *actually* chose to use these monitoring stations—a fact-bound question governed entirely by ordinary principles of contract law. Moreover, even that question is of limited temporal significance because the same drafters have already begun the process of revising Petitioner's NPDES permit. As the case does not raise the issues of law suggested in the Petition, Amici respectfully suggest that the Court consider dismissing the writ as improvidently granted.

ARGUMENT

In *Miccosukee*, this Court interpreted section 402 of the Clean Water Act, 33 U.S.C. § 1342, to require an NPDES permit for water transfers only when polluted water moves between "meaningfully distinct" water bodies. 541 U.S. at 109-110, 112. That holding, which the parties discuss more fully, see Pet. Br. 30-34; Resp. Br. 30-32, limits the circumstances under which NPDES permits are required.

Petitioner would have this Court believe that *Miccosukee* similarly limits MS4 NPDES permit drafters' ability to use mass-emissions monitoring stations to establish individual permittees' liability for permit violations. Specifically, Petitioner suggests that data from the stations cannot serve as evidence of an individual discharger's violation of the permit terms unless the stations themselves measure the flow of polluted water between meaningfully distinct water bodies.

That is simply not true. Neither the *Miccosukee* decision nor the Act limits MS4 NPDES permit drafters' discretion in deciding how to employ mass-emissions monitoring stations. On the contrary, as we explain, the Act and its implementing regulations make crystal clear that in the complex and uncertain world of MS4 permitting, permit drafters have broad discretion to design workable, individualized compliance regimes that make use of representative data to assess both permit performance *and* permittees' compliance. In this context, permit drafters are well within their authority to rely on data from monitoring stations as evidence of individual permittees' violations, *even if data from the stations would not be sufficient, under*

Miccosukee, *to trigger the NPDES permitting requirement in the first place.*

That analysis does not dispose of the central issue in this case—whether the drafters of Petitioner's permit in fact chose to use mass-emissions monitoring stations to assess Petitioner's compliance. But that sole remaining issue is narrow, fact-bound, and far less significant than the issue this Court ostensibly granted certiorari to resolve.

I. THE PARTIES' DISPUTE TURNS ON A NARROW AND FACT-BOUND QUESTION OF PERMIT INTERPRETATION.

We begin by clarifying the issue at the heart of the parties' dispute. The NPDES permit at issue here prohibits discharges from the Los Angeles County Flood Control District MS4 (District MS4) that cause or contribute to violations of Water Quality Standards. J.A. at 97. The permit covers Petitioner, 84 cities incorporated within Petitioner's district, and the County of Los Angeles. J.A. at 55. The co-permittees' storm drain systems are interconnected, but Petitioner owns the bulk of the MS4 infrastructure, with more miles of storm drains and open channels than all 84 co-permittee cities combined. *Natural Res. Def. Council v. Cnty. of L.A.*, 2010 WL 761287, at *2 (C.D. Cal. 2010).

The permit requires Petitioner to monitor mass emissions at representative, in-stream monitoring stations, including stations in the Los Angeles and San Gabriel Rivers. J.A. at 219; Pet. Br. 27. Data from those stations enable Petitioner to determine if the MS4 is contributing to exceedances of Water Quality Standards, and to assess trends in mass

emissions over time. J.A. at 219. The only question in this case is whether those data also serve as evidence that individual permittees have violated the permit.

Petitioner argues that exceedances of Water Quality Standards at the mass-emissions monitoring stations do not constitute evidence that any particular discharger has violated its permit obligations. *See* Pet. CA9 Br. 30 ("[Mass-emission monitoring] neither measures nor was designed to measure any individual permittee's compliance with the Permit."). Rather, in Petitioner's view, the monitoring stations merely provide data about permit efficacy and the condition of the receiving waters into which the District MS4 discharges. *Id.* at 31.

Respondents, by contrast, argue that water quality exceedances at the monitoring stations also establish individual permittees' liability for permit violations. *See, e.g.*, Resp. CA9 Reply Br. 14 ("[L]iability must be determined at the mass emission stations."). Respondents further suggest that once an exceedance is measured, liability should be apportioned according to each permittee's responsibility for the discharged pollutant. *Id.* at 15.

This is a substantial disagreement, but at least as an initial matter, its resolution hinges on proper reading of the permit terms—an exercise governed by ordinary principles of contract law. *See Piney Run Preservation Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 269 (4th Cir. 2001) (explaining that a court interprets an NPDES permit as it would a contract); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 982 (9th Cir. 1995) (same). The disagreement would present a broader Clean Water Act question only if the Act or its implementing regulations imposed some limit on permit drafters'

use of mass-emissions monitoring stations to evaluate permit efficacy and assess compliance. As discussed below, however, that is not the case.

II. *AB INITIO*, PERMIT DRAFTERS HAVE DISCRETION TO DESIGN TAILORED COMPLIANCE REGIMES FOR EACH MS4 NPDES PERMIT, EMPLOYING MASS-EMISSIONS MONITORING STATIONS AS THE DRAFTERS SEE FIT.

Both the Clean Water Act and governing regulations grant the drafters of MS4 NPDES permits wide latitude to design flexible and workable compliance regimes. Of most relevance here, drafters have discretion to choose whether and how to use in-stream, mass-emissions monitoring stations—to monitor the quality of receiving waters, to evaluate overall permit effectiveness, *or to assess individual dischargers' compliance with permit terms*. Nothing in the governing legal regime limits permit drafters' choice in this regard. This Court therefore owes deference to the particular choice embodied in Petitioner's permit. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."); *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("We must reiterate that the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.").

A. Congress expressly granted the Environmental Protection Agency considerable flexibility in developing an NPDES permitting program for MS4s.

MS4s are complex systems designed to collect and convey stormwater. 40 C.F.R. § 126(b)(8). They cover many square miles and comprise numerous, geographically scattered, and sometimes uncharted sources of pollution, including municipal streets, catch basins, gutters, man-made channels, and storm drains. *Id.* Due to the large number of individual sources that contribute pollution to these systems, and also to the variability and unpredictability of storm events, MS4s are not well suited to conventional pollution monitoring techniques.

The facts of this case illustrate this complexity. Petitioner's NPDES permit covers a system that serves a population of approximately 9.5 million in an area over 3,000 square miles. J.A. at 67. The District Court called the system a "complicated web, with thousands of miles of storm drains, hundreds of open channels, and hundreds of thousands of connections." *Natural Res. Def. Council v. Cnty. of L.A.*, 2010 WL 761287, at *2. Petitioner alone operates about 500 miles of open channel and 2,800 miles of storm drain. *Id.* According to the Ninth Circuit, the exact locations of all the storm drain connections in the system are unknown because a comprehensive map does not exist. *Natural Res. Def. Council v. Cnty. of L.A.*, 673 F.3d 880, 884 (9th Cir. 2011).

The Environmental Protection Agency (EPA) has long wrestled with the challenge of regulating pollution from MS4s. Shortly after Congress passed

the Clean Water Act in 1972, the agency attempted to exempt from NPDES permitting all separate storm sewers that contain only runoff uncontaminated by industrial or commercial activity. *See Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). The D.C. Circuit rejected this approach, however, observing that Congress plainly intended to require permits for *all* point sources of pollution, including storm sewers. *Id.* at 1383.

Faced with the prodigious task of regulating millions of storm-sewer point sources, EPA then promulgated a series of rules that were challenged at the administrative level and in the courts. *See Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Finally, in 1987, Congress stepped in, amending the Clean Water Act to grant EPA the express authority—and obligation—to create a permitting program for MS4s that serve a population of 100,000 or more. Water Quality Act of 1987, Pub. L. No. 100-4, § 405, 101 Stat. 7, 69-71 (1987); 33 U.S.C. §§ 1342(p)(2), (3).

In enacting these amendments, Congress recognized that for large cities like Los Angeles, MS4 permitting cannot be accomplished on a source-by-source basis. The amendments therefore give the Administrator—or a State like California, to which the Administrator has delegated permitting authority, 33 U.S.C. § 1342(b)—broad discretion to issue permits "on a system- or jurisdiction-wide basis," rather than requiring cities and counties to obtain separate permits for millions of individual stormwater discharge points. *Id.* § 1342(p)(3)(B)(i).

As amended, section 402 also leaves significant room for MS4 regulators to craft creative and tailored standards and compliance regimes. The section

requires that each permit reduce the discharge of pollutants to the "maximum extent practicable," but allows the addition of "such other provisions as the Administrator or the State determines appropriate for the control of ... pollutants." *Id.* § 1342(p)(3)(B)(iii); *cf. Conservation Law Found. v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004) ("[B]y using the term 'practicable' Congress intended ... to allow for the application of agency expertise and discretion in determining how best to manage fishery resources.").

The legislative history of the 1987 amendments supports the conclusion that Congress understood the intractability of MS4s. *See* H.R. REP. NO. 99-1004, 132 CONG. REC. H10576 (daily ed. Oct 15, 1986) (Conf. Rep.) (explaining that controls may vary from permit to permit). Acknowledging that "storm water is one of the most knotty problems with which the [EPA] and others have wrestled[]," legislators sought to allow permitting authorities to design workable, individualized, system-wide permits. H.R. REP. NO. 99-189, at 62 (1985); *see* 133 CONG. REC. 2,512-13 (1987) (Statement of Rep. James Rowland) (calling the stormwater program a "carefully crafted" solution that will allow communities to avoid the costly regulatory burden of source-by-source permitting).

In sum, Congress expressly and unambiguously delegated to EPA the authority to establish a flexible MS4 NPDES permitting program. As explained below, EPA regulations reasonably implement this mandate. The resulting MS4 NPDES permits therefore merit judicial deference.

B. EPA regulations provide state permitting authorities considerable flexibility in designing the monitoring provisions for a particular MS4 permit.

Acting on the authority delegated in Clean Water Act section 402, 33 U.S.C. § 1342, EPA created a complex permitting process for MS4s.[2] Of most relevance to this case, the agency recognized that monitoring individual permittees' compliance with MS4 NPDES permits can be difficult. Indeed, some permittees may be unable even to *identify* let alone monitor all discrete discharge points in their systems, because MS4s can cover so vast an area, and storm water volume and timing are so unpredictable. 55 Fed. Reg. 47,990, 48,048 (Nov. 16, 1990).

To address the monitoring problem, EPA provided state regulatory authorities and MS4 operators considerable flexibility in designing monitoring provisions for particular NPDES permits. Indeed, the Federal Register notice containing EPA's final rule implementing the NPDES program for medium and large MS4s uses the word "flexible" or "flexibility" over 40 times. 55 Fed. Reg. at 47,990-48,062. Moreover, EPA expressly stated its preference for permitting schemes that allow the collection of *representative* rather than *comprehensive* monitoring data. *See id.* at 48,049 ("Given the complex, variable

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[2] Petitioner does not challenge the regulations that created this permitting program, nor could it at this late date. 33 U.S.C. § 1369(b)(1) (requiring challenges to EPA regulations issued under the Clean Water Act be filed within 120 days of promulgation).

nature of storm water discharges from municipal systems, EPA favors a permit scheme where the collection of representative data is ... accomplished through monitoring programs during the term of the permit."). The regulations make clear that MS4 NPDES permits need not require monitoring of each storm water source but instead must establish a monitoring regime "sufficient to yield data which are *representative of the monitored activity*." 40 C.F.R. § 122.48(b) (emphasis added). Finally, EPA recognized the utility of in-stream monitoring stations as part of a program to collect representative data. 40 C.F.R. § 122.26(d)(2)(iii)(D). Overall, the regulations give permit writers the "necessary flexibility to develop monitoring requirements that more accurately reflect the true nature of highly variable and complex discharges" from these systems. 55 Fed. Reg. at 48,049.

C. Neither the Clean Water Act nor governing regulations limit permit drafters' use of in-stream, mass-emissions monitoring stations.

As the above discussion makes clear, the operative word in MS4 NPDES permitting is "flexible." Congress aimed to achieve significant pollution reductions from these systems, but it did not require any particular degree of pollution abatement and allowed for system-wide rather than outfall-by-outfall monitoring and control.

EPA's regulations stay true to that intent. On the one hand, the regulations require both pollution control and compliance monitoring. 40 C.F.R. §§ 122.44(i)(1) (providing that every permit "shall include" monitoring "[t]o assure compliance with

permit limitations"), 122.44(i)(5) (requiring that dischargers report, at least annually, all instances of non-compliance with permit limits). On the other hand, as noted above, the regulations allow permittees to rely on representative rather than comprehensive or outfall-by-outfall monitoring data to establish compliance.

In that context, permit drafters enjoy broad discretion to choose how best to employ representative data-collection devices like in-stream, mass-emissions monitoring stations. As such, the drafters of an MS4 NPDES permit could reasonably choose to use data from such stations to evaluate the overall effectiveness of the permit *or* to establish individual permittees' compliance.

CONCLUSION

This case does not involve a *Miccosukee*-like dispute about the proper reading of the NPDES-triggering language in the Clean Water Act. Indeed, pared to its essentials, this case raises no issue under that statute at all.

Instead, the case raises only a narrow and fact-bound question: does Petitioner's NPDES permit incorporate representative, in-stream, mass-emissions monitoring stations as a means of assessing individual dischargers' permit compliance (as Respondents argue), or does the permit instead use the stations merely to assess permit efficacy and the quality of receiving waters (as Petitioner claims)? Amici express no view on this question but suggest that, *ab initio*, the governing legal regime leaves permit drafters considerable flexibility in deciding whether and how to use such stations.

Viewed in this light, this case raises no significant issue of statutory or administrative law. Further, resolution of the parties' fact-bound interpretive dispute is of limited temporal significance because drafters are presently revising the District MS4 permit. *See* L.A. Reg'l Water Quality Control Bd., Notice of Opportunity for Public Comment and Notice of Adoption Meeting 1-2 (Oct. 18, 2012) ("The Board is expected to take action on the Revised Draft Tentative Order on November 8, 2012."), *available at* http://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/StormSewer/Updated/Notice%20for%20LA%20MS4%2011.pdf. Amici therefore respectfully suggest that the Court consider dismissing the writ as improvidently granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and SANTA MONICA BAYKEEPER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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INTERESTS OF THE *AMICI CURIAE*[1]

The *Amici Curiae* described herein submit this brief as representatives of local governmental entities and municipalities throughout the State of California and the nation, each of which has a vital interest in ensuring that cities and counties that own and/or operate Municipal Separate Storm Sewer System ("MS4") facilities have clear guidance concerning compliance with the Clean Water Act. As explained in greater detail below, the Ninth Circuit Court of Appeals' opinion in *Natural Resources Defense Council v. County of Los Angeles* reflects the confusion and ambiguity in the Ninth Circuit over the regulation of discharges of pollutants from an MS4 outfall to waters of the United States, particularly where the MS4 may overlap with navigable waters that have been improved for flood control purposes.

The League of California Cities ("League") is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.

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[1] The parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *Amici Curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State of California. The League's Legal Advocacy Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee identified this case as being of such significance and committed to providing *amicus* support.

The California State Association of Counties ("CSAC") is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a significant matter affecting all counties in California and is worthy of *amicus* support.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Founded in 1924, NLC strengthens local government through advocacy, research, and information sharing on behalf of hometown America.

Most members of the *Amici* organizations are subject to the Clean Water Act, including the National Pollutant Discharge Elimination System ("NPDES") permit program regulating discharges into waters of the United States. If the Ninth Circuit's opinion is permitted to stand, counties and cities could be subject to severe Clean Water Act liability for the stormwater that merely flows through their channels. No evidence exists that Congress intended strict liability to be imposed on local governments that have no choice over whether to accept this regulatory responsibility. Unlike a private entity, these local governments cannot simply go out of business or refuse to accept stormwater. Thus, the Ninth Circuit's opinion creates a Catch-22 that cannot stand.

The Ninth Circuit's legal interpretation may affect how billions, if not trillions, of dollars will be spent across the country in the coming decades, and exposes local governments and their employees to significant civil and criminal liability for operating an MS4 that accepts and transports stormwater and urban runoff. To avoid these adverse legal consequences, the Court must overturn the Ninth Circuit's erroneous opinion.

SUMMARY OF THE ARGUMENTS

The League, CSAC, and NLC, as *Amici Curiae*, respectfully request that this Court overturn the Ninth Circuit's decision for the following reasons:

- The Ninth Circuit ignored this Court's precedent in the *Miccosukee Tribe* case regarding what it means to discharge to waters of the United States from an MS4.
- The Ninth Circuit ignored its own precedent and clear Congressional intent to treat municipal stormwater discharges differently from other discharges subject to the Clean Water Act's NPDES permit program.
- Upholding the Ninth Circuit's opinion will have unintended consequences not compelled by the terms of the Clean Water Act.

In ruling on this citizen suit filed under the Clean Water Act (hereinafter "CWA" or "Act"), the United States District Court for the Central District of California properly determined that "Plaintiffs had presented no evidence that discharges (meaning outflow from a point source) from the County or District portions of the MS4 were causing or contributing to pollutant exceedances at the mass emission stations downstream." (April 26, 2010 Order, Petitioner's Appendix to Petition for Writ of Certiorari, at 99-100.) Further, the District Court stated "Plaintiffs failed to present evidence that the standards-exceeding pollutants passed through the Defendants' MS4 *outflows* at or near the time the exceedances were observed. Nor did Plaintiffs provide any evidence that the mass emissions stations themselves are located at or near a Defendant's outflow." (*Id.* at

100; *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 891 (9th Cir. 2011).)

For the Los Angeles and San Gabriel rivers, the Ninth Circuit turned this rational decision into a contorted conclusion that water flowing from one portion of a river to another portion of the same river constituted a "discharge of pollutants" subject to the requirements of an NPDES permit. In those two Southern California rivers, water flows from unlined headwaters, through improved, upstream portions, then down through both lined and unlined downstream portions of the same rivers before entering the Pacific Ocean.

The concrete-lined portions are identified as part of the MS4 operated and maintained by the Petitioner Los Angeles County Flood Control District ("District") for flood control purposes, while the unlined portions are not. However, according to the Ninth Circuit, the flow of water through a single, continuous river constitutes a "discharge" from an outfall under the Clean Water Act because that flow merely crosses a jurisdictional line that demarcates the MS4 boundary. (*Natural Resources Defense Council*, 673 F.3d at 900-01.)

In other words, the Ninth Circuit has arbitrarily divided the Los Angeles and San Gabriel Rivers into sections based on the jurisdictional boundary of the District's MS4, and held that water merely flowing

from one section of each river to another violated the CWA.

Although the Ninth Circuit recognized that plaintiffs were required to prove that polluted stormwater passed through an outfall of the District's MS4 to show a violation, the Ninth Circuit did not require the plaintiffs to actually identify such an outfall. Rather, the Ninth Circuit held that "the precise location of each outfall is ultimately *irrelevant* because there is no dispute that the MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations." (*Id.* at 900.) This interpretation violates the CWA, which requires a citizen-suit plaintiff to prove a "discharge of a pollutant" from a "point source" outfall to navigable waters. The Ninth Circuit has essentially eliminated the "point source" or "outfall" requirement from the Act, at least as it relates to municipal stormwater.

In reaching this conclusion, the Ninth Circuit apparently assumed that the boundary of the MS4 is necessarily an "outfall," even where that boundary lies within the confines of the river itself. The Ninth Circuit's holding directly conflicts with the Supreme Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-10 (2004), and must be overturned. Failure to clarify the legal requirements would also make MS4 owners and operators strictly liable for the quality of all water flowing through their MS4 and, therefore, helpless targets for citizen suit plaintiffs.

The Ninth Circuit's decision also failed to recognize that permitting of stormwater discharges for municipalities is *different* than permitting for standard, end-of-pipe industrial discharges. (*Natural Resources Defense Council, Inc.*, 673 F.3d at 894-95.) The Ninth Circuit ignored Congress's distinct approach for the regulation of municipal stormwater discharges. While NPDES permits have been required for municipal stormwater discharges since 1989 under 33 U.S.C. §1342(p), these discharges require only the implementation of programs to reduce pollutants to the *maximum extent practicable* ("MEP"), not strict compliance with water quality standards. (*See Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. 1999).)

Unlike industrial dischargers, local governments cannot simply go out of business or find another way of dealing with billions of gallons of stormwater that fall each year within the jurisdictional boundaries of cities and counties. A municipality is required to accept urban runoff from private development. To avoid catastrophic flooding, only one realistic method exists for dealing with municipal stormwater: channeling it quickly to the nation's greater waterways, such as the ocean.

The ability of government entities to control flooding and facilitate drainage of the stormwater within their jurisdictions is essential. (*See New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905) ("The drainage of a city in the interest of the public health and welfare is

one of the most important purposes for which the police power can be exercised.").) Indeed, flood control is one of the most basic functions of local government.

The Ninth Circuit's decision creates unintended consequences by shifting the burden of proof in enforcement actions, and by creating obligations of one municipality to regulate sources of pollutants within another municipality, which are impossible physically and outside of its legal authority.

Clarification of the point and manner of compliance for the legal obligations applicable to MS4 owners and operators must be provided in order to ensure regulatory certainty for the thousands of local governments that exist across the country.

Therefore, in order to end the legal inconsistencies and confusion created by the Ninth Circuit's decision below, and to provide a clear set of legal guidelines for local governments regarding the location and manner of compliance for MS4 discharges, *Amici* respectfully request that this Court reverse the decision below.

REASONS WHY THE NINTH CIRCUIT'S DECISION MUST BE REVERSED

I. THE NINTH CIRCUIT'S DEPARTURE FROM THIS COURT'S PRECEDENT REGARDING DISCHARGES TO WATERS OF THE UNITED STATES MUST BE CORRECTED.

The CWA prohibits the discharge of pollutants from a point source into the waters of the United States without a permit. (33 U.S.C. §§1311(a), 1342.) The CWA defines "discharge of a pollutant" as "any *addition of any pollutant to navigable waters from any point source*." (33 U.S.C. §1362(12)(A) (emphasis added).) In order to prove a violation of the Act, a plaintiff must demonstrate that each element of a "discharge" occurred. (*See U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 215 F. Supp. 2d 239, 246 (D. Me. 2002).)

An MS4 generally contains multiple point sources,[2] called outfalls. An "outfall" is "a *point source* as defined by 40 C.F.R. 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States." (40 C.F.R. §122.26(b)(9).) The Ninth Circuit's holding blatantly ignores that the

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[2] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." (33 U.S.C. §1362(14); 40 C.F.R. §122.2.)

regulatory definition of outfall explicitly "*does not include open conveyances connecting two municipal separate storm sewers, or* pipes, tunnels or *other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.*" (40 C.F.R. §122.26(b)(9) (emphasis added).)

This regulation is consistent with the reading of the plurality opinion of this Court in *Rapanos v. United States*, which emphasized that "point sources" and "navigable waters" are *distinct and separate* categories. (*Rapanos*, 547 U.S. 715, 735 (2006) ("The definition of 'discharge' [*to* navigable waters *from* a point source] would make little sense if the two categories were significantly overlapping.").)

Thus, a discharge from an MS4 only occurs where the MS4 discharges and adds pollutants from a non-navigable point source (i.e., an MS4 outfall) to waters of the United States. However, as in this case, where an MS4 includes portions of a waterway, and water is just being conveyed from the MS4 portion of a navigable water through the non-MS4 portion of the same navigable water, no addition of pollutants to a navigable water has occurred or been proven merely from the movement of that water downstream. (*See, e.g., South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. at 109-12; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001) ("If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or

anything else to the pot (beyond, perhaps, a *de minimus* quantity of airborne dust that fell into the ladle). In requiring a permit for such a 'discharge,' the EPA might as easily require a permit for Niagara Falls."); *California Sportsfishing Protection Alliance v. Lake Wildwood Association*, 2006 WL 2734370, *6 (E.D. Cal. Sept. 26, 2006) ("[T]he release of water from Lake Wildwood over the dam does not constitute the 'addition' of pollutants for which the defendants are required to have an NPDES permit."); *Friends of the Everglades v. South Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1219 and 1228 (11th Cir. 2009) (upholding EPA's regulation adopting the unitary waters theory[3] as a reasonable, and therefore permissible, construction of the Act's language).)

Further, an MS4 conveyance that allows for the movement of water from one part of a water of the United States to another does not "discharge" pollutants. As this Court held in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. at 109, the movement of water within a single water body "cannot constitute an 'addition' of

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[3] EPA's water transfer regulation, which became final on June 13, 2008, was adopted to "clarify that water transfers are not subject to regulation under the National Pollution Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." (*See* NPDES Water Transfers Rule, 73 Fed.Reg. 33,697-708 (June 13, 2008), codified at 40 C.F.R. §122.3(i)).

pollutants." The flowing water through a river represents a unified system that cannot be arbitrarily parsed into segments. (*See accord id.* at 109-10 (2004) (citing to *Catskill Mountains Chapter of Trout Unlimited, Inc.*, 273 F.3d at 492.)

In holding that the natural downstream movement of water in the Los Angeles and San Gabriel Rivers through portions of the District's MS4 constituted "discharges" from the District's MS4, the Ninth Circuit ignored this Court's precedent and created confusion over what is a discharge, and what is not. This Court must remedy this substantial confusion and inconsistency wrought by the Ninth Circuit's decision below by confirming that the movement of water within a single water body does not constitute a discharge from a point source or outfall under the CWA, regardless of whether portions of the water body are concrete-lined and included within the jurisdiction of an MS4.

Congress defined municipal stormwater conveyances, MS4s, as "point sources" to be regulated at the point from which they discharge into a "water of the United States."[1] The Ninth Circuit blurred the line

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[1] The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters *from any point source* [or] any addition of any pollutant to the waters of the contiguous zone or the ocean *from any point source*. . . ." (33 U.S.C. §1362(12) (emphasis added).) "Navigable waters" is defined as "waters of the United States, including the territorial sea," (33 U.S.C. §1362(7).)

between a "point source" and "water of the United States" by considering the Los Angeles and San Gabriel Rivers to be both, simultaneously. This is untenable, and makes the point of regulatory compliance impossible to determine. Under that ruling, local governments are provided with no guidance as to *where* to measure compliance with MS4 permits.

II. PREVIOUS GUIDANCE ON THE DIVIDING LINE BETWEEN POINT SOURCES AND RECEIVING WATERS REMAINS MURKY.

The classification of a conveyance as either a "point source" or a "water of the United States" is of critical importance to the *Amici* as most cities and counties are covered by an MS4 permit issued under the NPDES discharge permitting program. (*See accord* at 33 U.S.C. §1342(b).) Thus, it is critical for MS4 owners and operators to understand where the point of compliance will be measured under that program. This will allow them to measure performance, institute changes, and have certainty regarding their potential legal exposure.

Previous Supreme Court decisions have wrestled with this, but have not set forth a clear explanation for determining the dividing line between the two. (*See Rapanos*, 547 U.S. at 742 (The plurality decision did not explain how to determine when a water body is a point source or a water of the United States).)

The state of the law on this issue is less than clear, and is particularly murky in the Ninth Circuit. In 2001, in *Headwaters, Inc. v. Talent Irrigation District* (243 F.3d 526, 533 (9th Cir. 2001)), the Ninth Circuit held that "irrigation canals were 'waters of the United States' because they are tributaries to the natural streams with which they exchange water." However, most point sources, including pipes, ditches, and channels, are also tributary to and eventually flow into natural streams. (33 U.S.C. §1362(14); 40 C.F.R. §122.2.) Further, agricultural irrigation return flows contained in irrigation channels are expressly exempted from the NPDES permitting requirements. (33 U.S.C. §1342(*l*)(1) ("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.") Thus, the Ninth Circuit turned the analysis on its head by transforming permit-exempt irrigation canal "point sources" into "waters of the United States."[6]

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[6] The Ninth Circuit concluded that its decision in *Headwaters* was consistent with this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). According to the Ninth Circuit, "[t]he irrigation canals in this case are not 'isolated waters' such as those that the Court concluded were outside the jurisdiction of the Clean Water Act[,] [b]ecause the canals receive water from natural streams and lakes, and divert water to streams and creeks." (*Headwaters*, 243 F.3d at 533.) Certainly

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In *Headwaters*, the Ninth Circuit relied on another pre-*Rapanos* decision, *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), in which the court held that a drainage ditch, which was "part of a storm drainage system designed to discharge stormwater into Tampa Bay," was "a tributary of Tampa Bay and thus a 'water of the United States.'" (*Eidson*, 108 F.3d at 1342-43.) However, the *Eidson* decision was expressly called into question by the plurality in *Rapanos*. (*See Rapanos*, 547 U.S. at 725-26 (plurality opinion).)

Despite intervening developments, the Ninth Circuit has concluded that the *Rapanos* decision "has not undercut our prior analysis," and has continued to apply the *Headwaters* rule. (*See United States v. Moses*, 496 F.3d 984, 989-90 (9th Cir. 2007) (stating that Justice Kennedy's concurring opinion in *Rapanos* "is the controlling rule of law" and that "[t]he plurality's first requirement – permanent standing water or continuous flow, at least for a period of 'some months,' – makes little practical sense").)

The practical impact here cannot be over-stated. A conveyance is either a "point source," or a "water of the United States." It cannot logically be both. This classification is material, of course, because without

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no such leap of logic or holding follows from *SWANCC*. The fact that isolated waters are beyond the reach of the Clean Water Act does not sanction the contrary, namely that every *non-isolated* water *is* within the Act's reach.

this knowledge, cities and counties cannot know which water quality standards apply to the waters to which they discharge,[6] and cannot make improvements to reduce pollutants to the maximum extent practicable with the ultimate goal of eventually achieving water quality standards in the local waterways.

For these reasons, this Court should explicitly spell out the differences between MS4s, tributaries, and "waters of the United States."

III. OTHER PORTIONS OF THE NINTH CIRCUIT'S OPINION CONTAINED THE CORRECT CONCLUSIONS.

Portions of the Ninth Circuit's decision were consistent with applicable law. For example, the Ninth Circuit stated that: "While it may be undisputed that exceedances have been detected, *responsibility for those exceedances requires proof that some entity discharged a pollutant.* Indeed, the Permit specifically states that '*discharges from the MS4* that cause or contribute to the violation of the Water Quality Standards or water quality objectives are

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[6] Different "waters of the United States" may possess different beneficial uses and water quality criteria set to protect those uses (*e.g.*, water quality standards). (*See* 33 U.S.C. §1313(c)(2)(A)). Water quality standards generally do not apply within an MS4 (i.e., on municipal streets, or in curbs, gutters, ditches, manmade channels, and storm drains). (*See* 40 C.F.R. §122.26(b)(8) (definition of "municipal separate storm sewer").)

prohibited.'" (*Natural Resources Defense Council*, 673 F.3d at 898 (emphasis added).)

The Ninth Circuit also correctly found that "*The Watershed Rivers are all navigable waters*. Thus, the *primary factual dispute between the parties is whether the evidence shows any addition of pollutants by Defendants to the Watershed Rivers*." (*Id.* at 898-99 (emphasis added).) However, that is where the decision got off track by becoming distracted by amorphous permit terms,[7] and by ignoring the on-the-ground facts.

Instead of determining whether there was an actual addition of pollutants, the Ninth Circuit took issue with the state of the facts. (*See Natural Resources Defense Council*, 673 F.3d at 899 (" . . . Defendants ignore their role as controllers of thousands

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[7] The Ninth Circuit got distracted with the permit terms by noting that "While Defendants are correct in noting that mass-emissions monitoring has as one of its goals 'estimat[ing] the mass emissions from the MS4,' Defendants fail to mention that another goal, listed just below 'estimating,' is '[d]etermin[ing] if the MS4 is contributing to exceedances of Water Quality Standards.'" (*Natural Resources Defense Council*, 673 F.3d at 896.) *Estimations* of mass emissions should not be the basis for holding an entity strictly liable. Similarly, mass-emission data is not detailed enough to determine whether a specific MS4 is contributing to water quality standards exceedances, most all of which are based on *concentration*, not *mass*. (*See, e.g.*, 40 C.F.R. §131.38(b)(1) (California Toxics Rule setting water quality criteria based on concentration (micrograms per liter (µg/L).) Furthermore, the data is not specific as to what particular MS4 contributed what portion of that mass and at what concentration.

of miles of MS4 and the stormwater it conveys . . . by demanding that Plaintiffs engage in the Sisyphean task of testing *particular* storm drains in the County for the source of each pollutant. Likewise, Plaintiffs did not enlighten the district court with sufficient evidence for certain claims and assumed it was obvious to anyone how stormwater makes its way from a parking lot in Pasadena into the MS4, through a mass-emissions station, and then to a Watershed River.") (footnote omitted).)

The analysis further broke down when the Ninth Circuit mischaracterized the concrete-lined portions of the Watershed River. (*See id.* at 899-900.) The Ninth Circuit misconstrued the location of the mass-emission stations and determined that "*when pollutants were detected* [*at the mass-emission stations*], *they had not yet exited the point source into navigable waters.*" (*Id.* at 899 (emphasis added).) This conclusion is erroneous because the mass-emission stations are situated within the Watershed Rivers themselves.

Thus, the District didn't "control[] the polluted stormwater at the time it was measured" and there was no evidence that the District "caused or contributed to the exceedances" because the water below the mass-emission stations was never "again discharged to the rivers" – it was already *IN* the rivers. (*Id.*)

The Ninth Circuit then made an incorrect legal conclusion that "[a]s a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction – not a

naturally occurring Watershed River." (*Id.* at 899-900) (quoting *Headwaters,* 243 F.3d at 533 and 40 C.F.R. §122.2(c), (e).) In addition, the Ninth Circuit made an incorrect factual assumption that "[a]t least some outfalls for the MS4 were downstream from the mass emissions stations." (*Natural Resources Defense Council*, 673 F.3d at 900.) These two inaccuracies led to a final improper inference that "[t]he *discharge from a point source occurred when the still polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located,* ***through an outfall,*** *and into the navigable waterways.*" (*Id.* (emphasis added).) There are no outfalls downstream of the mass-emission stations (unless one deemed the Los Angeles River and San Gabriel Rivers to themselves be outfalls to the Pacific Ocean, a position not argued by any of the parties).

Thus, the Ninth Circuit twisted itself into unsupportable conclusions that "the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations" and that because "the Los Angeles River and San Gabriel River mass-emission stations are in concrete portions of the MS4 controlled by the District, it is beyond dispute that the District is discharging pollutants from the MS4 to the Los Angeles River and San Gabriel River in violation of the Permit." (*Id.* at 900-01.)

Contrary to the arguments made in the *amicus* brief submitted by the United States, per the request

of this Court prior to granting certiorari, the actual facts of the case are critical and must be considered.[6] Had those facts been considered correctly, the Ninth Circuit's result would have been different as demonstrated by the remaining text of that opinion.

In the instances where the Ninth Circuit thought the mass-emission stations were in the Watershed River instead of the MS4, the result was 180 degrees different. In the Santa Clara River and Malibu Creek situations, the Ninth Circuit agreed with the district court that:

> "[A]s the record is currently constituted, it is *not possible to mete out responsibility for exceedances detected in the Santa Clara River and Malibu Creek* (Claims 1 and 4). Like the district court, we are *unable to identify the relationship between the MS4 and these mass-emissions stations*. From the record, it

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[6] *See* Brief for the United States as Amicus Curiae (May 2012) at 17 ("[T]he court of appeals appears to have decided the case on the mistaken understanding that the relevant mass-emissions stations were located in the MS4 at a point *before* the MS4 became coextensive with the rivers."); at 15 ("The court of appeals was thus mistaken to the extent it determined that polluted stormwater flowing through the monitoring stations was *later* discharged from the MS4 into the rivers. Rather, the pollutants passing through the stations already had been discharged into the rivers from upstream MS4 outfalls. By itself, however, that sort of factual mistake does not warrant this Court's review."); and at 12 ("Any such factual mistake, irrelevant to whether a permit violation had occurred and unaccompanied by any legal error likely to affect the disposition of future cases, does not warrant this Court's review.").

> appears that *both monitoring stations are located within the rivers themselves*. Plaintiffs have not endeavored to provide the Court with a map or cogent explanation of the interworkings or connections of this complicated drainage system.
>
> We recognize that both the Santa Clara and Malibu Creek Monitoring Stations are downstream from hundreds or thousands of storm drains and MS4 channels. *It is highly likely, but on this record nothing more than assumption, that polluted stormwater exits the MS4 controlled by the District and the County, and flows downstream in these rivers past the mass emissions stations*. To establish a violation, Plaintiffs were obligated to spell out this process for the district court's consideration and to spotlight how the flow of water from an ms4 'contributed' to a water-quality exceedance detected at the Monitoring Stations." (*Natural Resources Defense Council*, 673 F.3d at 901 (emphasis added and citation omitted).)

This should have been the holding for *all of the Watershed Rivers*, that mass-emission stations do not demonstrate that any particular discharger was responsible for adding the mass of a particular pollutant in the water that flows by those measuring stations. Samples must be taken from a specific outfall, along with contemporaneous measurements in the river above and below that outfall in order to prove with scientific certainty that a particular outfall and responsible discharger were liable for

causing the river to exceed the applicable water quality standards. For if the river is already exceeding the standards above that outfall pipe, it cannot be said that the outfall pipe is causing those exceedances and the search for the source of the standards-exceeding pollutants should continue upstream.

IV. HOLDING MUNICIPALITIES STRICTLY LIABLE FOR THE POLLUTION IN RIVERS WAS NEVER INTENDED BY THE CLEAN WATER ACT.

Under section 402(p)(3)(B) of the CWA, Congress established a distinctly different regulatory approach for municipal stormwater discharges and subjected them to a different set of requirements. (33 U.S.C. §1342(p)(3)(B).) By imposing liability based simply on the presence of pollutants within the river (even if considered to be part of an MS4 conveyance system), the Ninth Circuit fails to respect the special treatment that the Congress afforded to municipal storm water systems.

NPDES permits for other categories of point source discharges, including *industrial* stormwater discharges, must contain technology-based effluent limitations and any more stringent water quality-based effluent limitations necessary to meet applicable water quality standards. (*See* 33 U.S.C. §1311(b)(1)(A) and (C) (requiring Best Practicable control Technology ("BPT") or "any more stringent limitation, including those necessary to meet water quality standards"); 33 U.S.C. §1311(b)(2) (requiring Best Available

Technology economically achievable ("BAT") for toxic pollutants and Best Conventional pollutant control Technology ("BCT") for conventional pollutants); 33 U.S.C. §1342(p)(3)(A) (industrial stormwater regulation).)

In contrast, municipal stormwater discharges from MS4s are to be regulated by NPDES permits that:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the *maximum extent practicable*, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.

(33 U.S.C. §1342(p)(3)(B)(i)-(iii) (emphasis added).)[9]

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[9] Importantly, the CWA does not prescribe water quality-based requirements for municipal stormwater. (*See Defenders of Wildlife*, 191 F.3d at 1165.) Water quality-based requirements differ from technology-based requirements in that water quality-based requirements are set based on the ambient water quality of and the applicable water quality standards for a particular water body, while technology-based standards focus upon the water quality achievable by particular pollution control measures or technologies. This partial exemption is not unusual

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The "Maximum Extent Practicable" standard in Section 302(p)(3)(B)(iii), 33 U.S.C. §1342(p)(3)(B)(iii), mandates that an MS4 permit require municipalities to pursue sound pollutant control techniques and programs that are technically and economically feasible. These provisions of the Act recognize that MS4s are unlike traditional point source dischargers, such as individual facility NPDES permittees including industrial facilities and wastewater treatment plants.[10] Municipalities, like the District, did not choose to be in the stormwater control business; this liability was involuntarily thrust upon them by Congress in 1989 without a source of funding for this expensive and extensive regulatory program.

When municipalities owning and operating publicly owned treatment works (POTWs) were

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as the CWA also *totally exempts* some types of discharges from the permitting requirements of the Act. (*See* 33 U.S.C. §1342(*l*)(1)-(2) (CWA §402(*l*)(1)-(2)) (exempting agricultural return flows from irrigated agriculture and certain discharges of stormwater from mining operations or oil and gas production from the requirement to obtain an NPDES permit).)

[10] The decision below not only ignores the separate statutory regulation of MS4s, but also ignores its own precedent. (*Defenders of Wildlife*, 191 F.3d at 1164-66 (Ninth Circuit held that MS4 permits were ***not required*** to strictly meet water quality standards).) In the decision below, the Ninth Circuit took the opposite tack, holding that strict compliance with water quality standards ***was required.*** In so doing, the Ninth Circuit not only ignored its own precedent, but disregarded the other 70 pages of the MS4 Permit that give context to the issues at bar, the MS4 Permit's explanatory Fact Sheet, and other relevant statewide precedent.

required under the CWA to upgrade their treatment technologies, the federal government provided more than $60 billion in federal grant and low-interest loan funds, often matched in part by state monies. (*See* http://water.epa.gov/grants_funding/cwf/Construction-Grants-Program.cfm.) Thus, those municipalities were not subjected to the massive unfunded mandate that is the municipal stormwater program.

And, unlike industrial dischargers, cities and counties cannot just go out of business to avoid regulation and the associated costs, or to avoid the substantial civil and criminal liabilities. (*See* 33 U.S.C. §1319(a)-(d).) Ensuring the correct interpretation of this strict liability statute is crucial, given the absence of defenses applicable to municipal stormwater discharges.

Unlike other environmental law statutes, such as the Clean Air Act (42 U.S.C. §7413(c)(5)(D)) or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," 42 U.S.C. §9607(b)), the CWA contains no general or affirmative defenses, such as acts of God, war, or third parties.[11] Without such defenses, innocent municipal stormwater managers could be harshly penalized or jailed just

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[11] The only defenses under the CWA are created by regulation and these defenses only apply to treatment plants and technologies, which are not normally used for municipal stormwater. (*See* 40 C.F.R. §121.41(m) (bypass provisions), and (n) (upset provisions); *see also FMC Corp. v. Train*, 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977).)

because pollutants are found in the stormwater. (*See United States v. Weitzenhoff*, 35 F.3d 1275, 1293-1299 (9th Cir. 1993) (dissenting opinion).) This is particularly problematic when municipalities like the District may have little control over the flood waters and drainage received from private property within their jurisdictional boundaries, from other permitted entities that discharge stormwater or wastewater into the local storm drains and waterways, or from pollutants entering the water from atmospheric deposition.

Thus, this Court should confirm the unique character of storm water conveyed by MS4 owners and operators, who have a critical public mandate, aside from that set forth in the CWA, to transport water from sources they do not control to protect their citizens from flooding and related health and safety problems.

For these and the other reasons set forth herein, this Court should overturn the Ninth Circuit's opinion, which creates immense problems for counties and other municipalities. Cities and counties are already experiencing financial crises and the decision below, mandating immediate and strict compliance with water quality standards as measured in the rivers,[12]

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[12] The appropriate regulatory response when water quality standards are exceeded in a water body is to perform a Total Maximum Daily Load ("TMDL"). (33 U.S.C. §1313(d); 40 C.F.R. §130.2(i); 40 C.F.R. §130.7; *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-1129 (9th Cir. 2002) (explanation of TMDL regulatory

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will cost these entities billions of dollars. The Ninth Circuit's ruling will place many local governments on the verge of bankruptcy, and will subject all to massive civil liability to any "person" who decides to file suit. (*See* 33 U.S.C. §1365(a).) The Court should erase this bad decision from the books, and clarify where and how the Clean Water Act regulates MS4 discharges.

V. UPHOLDING THE NINTH CIRCUIT WILL CAUSE UNINTENDED CONSEQUENCES.

In addition to the impacts set forth previously, a failure to overturn the Ninth Circuit's decision would result in a shifting of the burden of proof in enforcement actions, including citizen suits. Currently, as pointed out by the Central District court and the Ninth Circuit, the Plaintiffs in this case were required to demonstrate that the District was discharging from the MS4 in violation of its permit. (*Natural Resources Defense Council*, 673 F.3d at 883, 901-02.) If a violation can be demonstrated merely by a river exceeding standards,[13] then the burden has suddenly been shifted to the Defendant to prove a negative – that it *didn't discharge* pollutants that caused those water quality exceedances. The Act provides no support for this shifted burden.

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program).) TMDLs are meant to address all pollutant sources and may allow time for those sources to come into compliance.

[13] *See supra* FN 12.

Further, if the District is suddenly responsible for all discharges into the River and the quality thereof, the District (as opposed to U.S. EPA, the State, or the citizens) has become the police officer even though the District may not have the legal authority to regulate the discharges to the river, most of which are already subject to NPDES permits. No legal authority exists for the District to require permitted dischargers to do more than they are already required to do under a valid NPDES permit.

For example, if an upstream discharger's valid discharge permit authorizes 10 micrograms per liter (µg/L) of copper, the District cannot unilaterally ratchet that requirement down to 3 µg/L. Furthermore, the District may have no jurisdiction over the cities and other entities that discharge into the MS4 and river because of its limited purpose as a flood control district.

Finally, it is not clear that even the sources of the pollutants have control over their discharges. For example, municipalities and other entities that have road-related runoff may have elevated copper discharges. Copper discharges can emanate from natural sources or from brake pad linings (which changed to copper after asbestos linings were discouraged for public health reasons). However, local public entities have no authority over natural sources or the copper content in brake pads, and likely have no ability to ban cars from traveling on their roads.

Therefore, in California, until the products used in the manufacturing of brake pad lining are modified no later than 2025 (*see* California S.B. 346 (2010)), stormwater entities will remain in compliance jeopardy. Short of installing large retention basins and numerous package treatment plants along freeways and roadways statewide in the interim, it is unclear that there are any best management practices ("BMPs") that will reduce copper levels below the extremely low aquatic life criteria set in the California Toxics Rule (40 C.F.R. §131.38(b)(1)), National Toxics Rule (40 C.F.R. §131.36(b)(1) and (d)(10)), or regional water quality control plans.

The same problem exists for zinc from tire wear and other pollutants as well. Any stormwater discharger whose flows have picked up this copper from disintegrating brakes or zinc from tire wear may be found strictly liable for discharges over which it has absolutely no control. (1JA57, Permit ¶ B.2.) Something is wrong with that scenario, and upholding the Ninth Circuit's decision would only perpetuate, and further amplify, this problem.

CONCLUSION

For the foregoing reasons, *Amici Curiae,* the League of California Cities and the California State Association of Counties, and the National League of Cities, support the Los Angeles County Flood Control

District in its request for reversal of the Ninth Circuit's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-460

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In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and SANTA MONICA BAYKEEPER,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES AND THE SANTA CLARA VALLEY WATER DISTRICT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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The National Association of Flood and Stormwater Management Agencies ("NAFSMA") and the Santa Clara Valley Water District ("SCVWD") respectfully submit this brief as *amici curiae* in support of the petitioner, Los Angeles County Flood Control District ("LACFCD" or "the District").[1]

INTEREST OF THE *AMICI*

NAFSMA is a national non-profit association of municipalities, special purpose public districts and state agencies. Its members represent a broad nationwide spectrum of flood control, stormwater management, water conservation, and other water-related districts, bureaus, departments, and other instruments of local, regional and state government. NAFSMA's member agencies serve a combined population of millions of people nationwide and are responsible for the protection of lives, property and the environment from the impacts of storm and flood waters. NAFSMA has an interest in this litigation because its members are directly involved in the

[1] Pursuant to Rule 37.3 of this Court, counsel of record for all parties were provided with notice of NAFSMA's and SCVWD's intention to file this *amici* brief. All parties have consented to the filing of this brief and written consents are being lodged herewith. In accordance with Rule 37.6, the *amici* represent that counsel for the *amici* authored this brief in its entirety and that no person or entity other than the *amici* and its representatives made any monetary contribution to the preparation or submission of this brief.

administration of stormwater utilities and the implementation of stormwater management programs mandated by Section 402(p) of the Clean Water Act and by the state and federal regulations implementing that provision. Over the past decade, the nature and complexity of the measures required by municipal stormwater permits has increased dramatically, along with the threat of citizen suits seeking to impose liability for noncompliance with those requirements. The Ninth Circuit's decision in this case will seriously undermine the ability of NAFSMA's municipal stormwater permit holding members to demonstrate compliance with their permits, and will significantly increase the risk of wasteful litigation over the terms and conditions of those permits.

The Santa Clara Valley Water District ("SCVWD") is an independent special district created by Act of the California State Legislature, with jurisdiction encompassing all of Santa Clara County's 1,300 square miles. SCVWD is the primary water resources management agency in Santa Clara County, which is located in the southern San Francisco, California Bay Area. Santa Clara County has over 1.8 million residents and includes the vital high-tech economy known as "Silicon Valley." SCVWD has authority for flood protection and water management, which includes the management of raw water and flood water conveyance systems. Characterizing conveyances of raw waters or storm waters as point source discharges under the Clean Water Act would significantly impact the SCVWD's ability to carry out its mission of flood

protection and water management in Santa Clara County.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's ruling that a "discharge" occurred when water flowed from the channelized sections of two navigable streams into the unimproved sections of the same rivers below is in conflict with relevant decisions of this Court, is inconsistent with the decisions of every circuit court that has considered the issue, and is incompatible with the basic structure of the Clean Water Act and the regulations governing the municipal stormwater permit program. For purposes of the Act, the Los Angeles and San Gabriel rivers are "navigable waters," and the channelized sections of those rivers cannot be redefined as "point sources" that are part of the petitioner's separate storm sewer system.

If not reversed, the Ninth Circuit's decision would make it impossible for municipal stormwater systems discharging to urban streams anywhere in the country to comply with the Act. Moreover, the court's finding that responsibility for a violation of the Act can be established solely on the basis of instream sampling results, without regard to the location of the defendant's own outfalls, would throw the entire municipal stormwater permit program into confusion,

and would have serious repercussions for the NPDES program in general.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT, THE DECISIONS OF OTHER CIRCUITS, THE STRUCTURE OF THE CLEAN WATER ACT AND THE REGULATIONS GOVERNING THE MUNICIPAL STORMWATER PERMIT PROGRAM

When rain falls on the southwestern slopes of the San Gabriel Mountains, the water flows downhill into the tributaries of the Los Angeles and San Gabriel Rivers, across Los Angeles County, and into the Pacific Ocean. Along its way, the Los Angeles River is augmented by runoff from the municipal separate storm sewer systems ("MS4s") operated by the Los Angeles County Flood Control District ("LACFCD" or "the District") and 31 separate municipalities. The San Gabriel River receives additional runoff from the District and from 29 other municipalities.[2] Portions of those rivers have been channelized, to a greater or lesser extent, for flood control purposes. The Los

[2] Fact Sheet/Staff Report for the County of Los Angeles Municipal Storm Water NPDES Permit (CAS004001) Order No. 01-182 (December 13, 2001), available at: http://www.swrcb.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/los_angeles_ms4/staffreportfactsheetfinal.pdf.

Angeles River, in particular, has been famously described as "51 miles of concrete."[3]

In this case, the Ninth Circuit ruled that channelized portions of the two rivers are not only parts of the MS4 operated by the District, but also "point sources" that are distinct from the "navigable waters" downstream. Accordingly, the court held that the District controlled all of the polluted stormwater in the rivers when it was measured, and therefore caused or contributed to the exceedance of applicable water quality standards when that water was "again" discharged to the unimproved segments of the rivers below. *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 898 (9th Cir. 2011). This ruling conflicts with relevant decisions of this Court, and it is inconsistent with the decisions of every other circuit that has considered the issue. Moreover, it is incompatible with the entire structure of the Clean Water Act ("CWA") and the regulations promulgated to implement the municipal stormwater program.

No court that has addressed the issue has ever found that the natural, unimpeded flow of water downhill within a single navigable water of the United States constitutes the "discharge of a pollutant" as

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[3] Blake Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* 173 (1999) (federal government created the "fifty-one-mile storm drain" that is still called the Los Angeles River).

that term is defined in the CWA. Most importantly, in Part III-C of its opinion in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), this Court held that if a canal ("C-11") and a nearby wetland area ("WCA-3") were simply two parts of the same water body, then pumping water from one into the other cannot constitute the "addition" of pollutants required to constitute a "discharge" as defined in the Act. That ruling commanded the agreement of eight of the Court's nine Justices. The dissenting justice declined to join the ruling for reasons that do not apply here, namely that the issue was not part of the question presented; it had not previously been raised by the parties; and, in the absence of pumping, pollutants would have to flow *uphill* from C-11 to reach WCA-3. *Id.* at 113. Two years later, in Part III-B of its decision in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 381 (2006) the Court was unanimous in its restatement of the basic principle established in *Miccosukee*, that if two identified volumes of water are simply part of the same water body, pumping water from one into the other cannot constitute an "addition" as required by the definition of the phrase "a discharge of pollutants" used in CWA § 402.

Prior to this Court's ruling in *Miccosukee*, a number of circuits had considered the meaning of "discharge" under the CWA, in a broad range of cases involving water released through dams, pumped through hydroelectric facilities or snowmaking equipment, collected and channeled from mining waste or

coal pile runoff, or forcibly transferred between different bodies of water. A review of those decisions reveals that, regardless of the divergent outcomes reached on the specific factual circumstances of each case, none of those courts would have found that a "discharge of pollutants" can occur within the same body of water.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the D.C. Circuit found that water released from a reservoir through a dam to the stream below was not a discharge from a point source by accepting EPA's view that for the addition of a pollutant to occur, the point source "must *introduce* the pollutant into navigable water from the outside world; dam-caused pollution, in contrast, merely passes through the dam from one body of navigable water (the reservoir) into another (the downstream river)." 693 F.2d at 174. As the Second Circuit noted later in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.2d 481, 491 (2d Cir. 2001), the reservoir and the stream below, "at least arguably, were sufficiently the same water that the release might not be considered an 'addition'; nothing was introduced to the water that was not, in some sense, already there." Similarly, in *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580, 581 (6th Cir. 1988), the Sixth Circuit found that the return of water that had been pumped uphill from a lake and passed through hydroelectric generators on its way back downhill to the lake was not a discharge, because the "movement of pollutants already

in the water is not an 'addition' of pollutants to navigable waters of the United States."

On the other hand, in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), the Second Circuit found that a railroad culvert between a pond and an adjacent wetland was a "point source," although both the pond and the wetland were considered navigable waters for purposes of the CWA. The court held that leachate from a city landfill that entered directly into the pond constituted an unlawful discharge when it passed through the culvert and into the wetland. Explaining this decision in a later case, the same court emphasized that "(1) the pond and marsh were different navigable waters; (2) the culvert was the relevant point source; and (3) the release of pond water through the culvert was a 'discharge.' We thus necessarily implied that the transfer of water from the pond to the marsh was an 'addition.'" *Catskill*, 273 F.3d at 492.

In *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305 (9th Cir. 1993), the Ninth Circuit found that surface runoff from an abandoned copper and zinc mine that was collected and channeled into a reservoir from which it passed into the Mokelumne River was a discharge because, unlike the facilities in *Gorsuch* and *Consumers Power*, the source of the pollution added to the river was surface runoff that had been collected or channeled from the abandoned mine site, while the unpolluted flow from the two naturally occurring drainages that formerly ran through the site had

been diverted around the facility and directly into the river below. Similarly, in *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992), the Fourth Circuit found that two collection ponds built to treat runoff and leachate from coal refuse "gob piles" were not "waters of the United States," but instead were "point sources" under the Clean Water Act. Distinguishing the facts before it from those in *Gorsuch* and *Consumers Power*, the court recognized and endorsed the holding in those cases that where pollutants already exist in the waters of the United States before contact with a facility, the mere diversion in the flow of those waters does not constitute an "addition" of pollutants to the waters.

In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1297-98 (1st Cir. 1996), the First Circuit found that water pumped from the East Branch of the Pemigewasset River and discharged into Loon Pond after passing through the defendant's snowmaking system constituted an "addition," but the reasons for the court's decision were that the pond and the river "are not the same body of water," and the transfer "would not occur naturally" because water from the river would have to "flow uphill" to reach the pond. Similarly, in the *Catskill* case cited above, 273 F.3d at 491-92, the Second Circuit held that the transfer of water through a tunnel from the Schoharie Reservoir into Esopus Creek was a discharge because the Creek was a separate body of water "utterly unrelated in any meaningful sense" to the reservoir and its watershed. The court agreed

with the principle established in *Gorsuch* and *Consumers Power* that there would be no "addition" if the water from which the discharges came was the same as that to which they go. Indeed, the court noted, if a permit was required for such a discharge, "the EPA might as easily require a permit for Niagara Falls."

Although the outcome in these cases varied on the basis of their factual scenarios, the one thing that is clear is that, consistently with this Court's decisions in *Miccosukee* and *S.D. Warren*, none of these courts would have found that a "discharge" occurs when water merely flows downhill from one segment to another within a single navigable stream. Indeed, even in the present case the Ninth Circuit itself agreed that no discharge could be found to have occurred at the two monitoring stations located "within the rivers themselves" in the Santa Clara River and Malibu Creek. It was only by mischaracterizing the legal status of the channelized portions of the Los Angeles and San Gabriel Rivers that the court was able to reach a different conclusion there.

A. A Channelized Urban Stream Is Not a "Point Source," and the Location Where It Flows into an Unimproved Section of the River Downstream Is Not an "Outfall."

The respondents in this case alleged that the petitioner was liable for causing or contributing to exceedances of water quality standards in four "watershed

rivers" located in Los Angeles County, in violation of the CWA and the terms of petitioner's National Pollutant Discharge Elimination System ("NPDES") permit. First Amended Complaint at ¶ 297 (Santa Clara River), ¶ 306 (Los Angeles River), ¶ 315 (San Gabriel River), and ¶ 325 (Malibu Creek). The District Court granted summary judgment to the petitioner on all four of these "watershed claims" because it found that the respondents had failed to present evidence sufficient for it to determine whether the pollutants detected at monitoring sites (the "mass emission stations") located within each of the four rivers had been discharged from the petitioner's MS4 outfalls. April 26, 2010 Order at 4. Explaining its decision, the District Court stated:

> That the pollutants must have passed through an outflow [*sic*] is key because, as the Court found in the March 2 Order, standards-exceeding pollutants must have passed through a County or District outflow in order to constitute a discharge under the Clean Water Act and the Permit. A co-permittee, including the county and the District, is responsible "only for a *discharge* for which it is the operator." Permit ¶ G.4 at 20 (emphasis added). *See also* 40 C.F.R. § 122.26(b)(1) ("*Co-permittee* means a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is the operator.")

April 26, 2010 Order at 3 (emphasis in original).

On review, the Ninth Circuit agreed with the District Court that establishing liability for the exceedences detected at the instream monitoring stations "requires proof that some entity discharged a pollutant," and that the CWA defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 673 F.3d 880, 898, *citing* CWA § 502(12), 33 U.S.C. § 1362(12). It also found that all of the watershed rivers are "navigable waters" as defined in CWA § 502(7), 33 U.S.C. § 1362(7). *Id.* It agreed with the District Court that, on the record before the court, it was not possible to establish responsibility for exceedances detected in the Santa Clara River and Malibu Creek, because the mass emission stations in those rivers "are located within the rivers themselves." 673 F.3d at 901.

With regard to the exceedances detected in the Los Angeles and San Gabriel Rivers, however, the Ninth Circuit ruled, "as a matter of law and fact," that the rivers below the mass emission stations are bodies of water that are "distinct" from the channels in which the stations are located, which it found to be parts of the MS4. The basis for the court's conclusion is reflected in several statements in the opinion to the effect that the monitoring stations in those two rivers "are located in a channelized portion of the MS4 that is owned and operated by the District," 673 F.3d at 889; "are located in a section of the MS4 owned and operated by the District," 673 F.3d at 899; or "are in concrete portions of the MS4 controlled by the

District." 673 F.3d at 900. Consequently, the court concluded,

> [t]he discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels where the Monitoring Stations are located, through an outfall, and into the navigable waterways. We agree with Plaintiffs that the precise location of each outfall is ultimately irrelevant because there is no dispute that MS4 eventually adds stormwater to the Los Angeles and San Gabriel Rivers downstream from the Monitoring Stations.

Id.

The Ninth Circuit's ruling erases a distinction that is fundamental to the operation of the CWA – that between "outfalls" on the one hand and "receiving streams" on the other (or, to use the statutory terms, between "point sources" and "navigable waters"). As Justice Scalia wrote for the plurality in *Rapanos v. United States*, 547 U.S. 715, 736 (2006), the definitions used in the CWA "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping."

EPA took particular care to respect this distinction when drafting regulations to implement the MS4 permit program established by the 1987 CWA amendments. CWA § 402(p)(4) directed EPA to establish regulations setting forth permit application

requirements for large MS4s (those serving a population of 250,000 or more) within 2 years, and for medium MS4s (those serving a population between 100,000 and 250,000) within 4 years. (Collectively, these two groups are referred to as "Phase I" MS4s, to distinguish them from smaller communities covered by the "Phase II" regulations issued in 1999.) EPA published its proposed rule for both large and medium MS4s in 53 Fed. Reg. 49416 (December 7, 1988), and issued its final regulations in 55 Fed. Reg. 47990 (November 16, 1990). Among the issues that EPA had to address in the new regulations were how to define a "municipal separate storm sewer," and what constitutes an "outfall" from that system. In the preamble to the proposed rule, the agency emphasized the need

> to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule. This use of the term "storm sewer" differs from the way that the term has often been used in the context of flood control, where natural streams and other water bodies are sometimes considered storm sewers.

53 Fed. Reg. 49416, 49442 (December 7, 1988). Consequently, activities such as "stream channelization, and stream bed stabilization, which occur in waters of the United States" would not be subject to NPDES permits under § 402 of the Act, even though they might require dredge and fill permits under CWA § 404. *Id.* The term "municipal separate storm sewer"

was therefore defined as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains ... *that discharges to waters of the United States....*" 40 C.F.R. § 122.26(b)(8) (emphasis added). The highlighted clause is an essential part of the definition, because it distinguishes man-made channels that discharge to the river from channels that are part of the river itself.

Responding to comments in its preamble to the final regulation, EPA explained that it was not necessary to clarify the existing definition of "point source" in 40 C.F.R. § 122.2. That section, which is based on the statutory language in CWA § 502(14), 33 U.S.C. § 1362(14), defined a "point source" as any conveyance "from which pollutants are or may be discharged."

> One commentator stated that "point source" for this rulemaking should be defined, for purposes of achieving better water quality, as those areas where "discharges leave the municipal [separate storm sewer] system." EPA notes in response that "point source" as currently defined will address such discharges, while keeping the definition of discharge and point source within the framework of the NPDES program, and without adding potentially confusing and ambiguous additional definitions to the regulation.

55 Fed. Reg. 47990, 47997 (November 16, 1990).

The Agency did find it necessary, however, to add a new, specialized definition for another term that had long been used in the NPDES permit program, but not previously defined – the term "outfall."[4] As explained in the preamble to the final regulation, the "entire thrust" of the regulation was "to control pollutants that enter receiving water from storm water conveyances." 55 Fed. Reg. at 47997. For purposes of the MS4 program, therefore,

> *Outfall* means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and ***does not include*** open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other ***conveyances which connect segments of the same stream or other waters***

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[4] "Outfall" is a term of art in the NPDES permit program. It was used throughout EPA's general NPDES permit regulations in 40 C.F.R. Part 122, although it is not defined in the CWA and was never given a formal regulatory definition before one was added to the Phase I regulations in 1990. The term "outfall" or "outfalls" appears 106 times in the current version of 40 C.F.R. Part 122, but the definition in 40 C.F.R. § 122.26 applies only to the 43 occurrences in that section referring to outfalls as the point at which a municipal separate storm sewer discharges to waters of the United States. Presumably, though not explicitly stated, the definition would also apply to the Phase II regulations in 40 C.F.R. §§ 122.30-37, which require each Phase II permittee to "[d]evelop, if not already completed, a storm sewer system map, showing the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." 40 C.F.R. § 122.34(b)(3)(ii)(B).

> ***of the United States and are used to convey waters of the United States.***

40 C.F.R. § 122.26(b)(8) (emphasis added). Not surprisingly, the Ninth Circuit *omits* the second part of the definition, containing the language highlighted above, when quoting this section in support of its conclusion that a discharge occurred when water flowed "through an outfall" from the concrete channels into the navigable waters below. 673 F.3d at 900. Having found the channelized portions of the rivers to be "point sources" distinct from the navigable waters downstream, the court went on to suggest that "the precise location of each outfall is ultimately irrelevant." *Id.* To the contrary, as EPA explained in the preamble to the proposed regulation, it is

> important to identify the location of such outfalls to clarify where the storm sewer system ends and where waters of the United States begin. In many situations, waters of the United States that receive discharges from municipal storm sewers can be mistakenly considered to be part of the storm sewer system.

53 Fed. Reg. at 49453. It was for that reason that the Agency chose to require each Phase I MS4 operator to provide the location of major outfalls in Part 1 of its permit application, and to supplement that

information in Part 2 of the application "so that, at a minimum, all major outfalls are identified." *Id.*[5]

The Ninth Circuit's ruling that portions of the Los Angeles and San Gabriel Rivers are "point sources" distinct from the rivers themselves, and the location where they flow into the unimproved sections of the rivers below is an "outfall," is contrary to the entire structure of the CWA and the regulations governing the MS4 permit program. For flood control purposes, the rivers may serve an essential function in providing drainage for the Los Angeles and San Gabriel watersheds, but as a matter of law, in terms of the federal regulatory program established under the CWA, they are "navigable waters" and *not* a part of the MS4 operated by the District.

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[5] Pursuant to the final rule, applicants are required to provide "[t]he location of *known* municipal storm sewer system outfalls discharging to waters of the United States" in Part 1, and to identify in Part 2 "[t]he location of *any major* outfall that discharges to waters of the United States that was not reported" in Part 1. 40 C.F.R. §§ 122.26(d)(1)(iii)(B)(*1*) and (d)(2)(ii). As noted above, the Phase *II* regulations require each permittee to map "the location of all outfalls and the names and location of all waters of the United States that receive discharges from those outfalls." 40 C.F.R. § 122.34(b)(3)(ii)(B).

B. Neither the Fact of Channelization nor the District's Management of the Watershed Rivers for Flood Control Purposes Can Alter Their Status as "Navigable Waters" Under State and Federal Law.

As explained above, the Ninth Circuit's only bases for treating the sections of the Los Angeles and San Gabriel Rivers where the mass emission stations are located differently from those in the Santa Clara River and Malibu Creek were that they were (1) "channelized" and (2) either "owned and operated" or "controlled" by the District. Neither of these facts can support the Ninth Circuit's erroneous legal conclusion that these segments of the two rivers are "point sources" rather than "navigable waters." It is well-established that a river continues to be considered as a navigable stream regardless of improvements to its channel. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921). This principle is derived from the common law. "A stream does not lose the attributes of a watercourse by the fact that a part of its channel may have been artificially created. The straightening of a crooked watercourse in order to facilitate the flow and avoid the flooding of bordering lands is not uncommon." *Horner v. City of Baxter Springs*, 116 Kan. 288, 290, 226 P. 779, 780 (1924). "A natural watercourse does not lose its character as a public watercourse because a part of its channel has been artificially created. Nor is the channel of a naturally navigable

watercourse made private because of reasonable improvements put upon it." *The Mentor Harbor Yachting Club v. Mentor Lagoons*, 170 Ohio St. 193, 199 (1959).

Nor can the status as a navigable river be changed by the exercise of private ownership or control. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("[T]hat the running water in a great navigable stream is capable of private ownership is inconceivable"). Indeed, in *S.D. Warren Co. v. Maine Bd. of Env. Protection*, 547 U.S. 370 (2006), this Court explicitly rejected a line of reasoning followed by the Supreme Judicial Court of Maine that was similar to the Ninth's Circuit's rationale in this case. S.D. Warren Co. operated several hydropower dams, from which water was funneled into a "power canal," through turbines, and back to the riverbed, passing around a section of the river below the impoundment. The state court ruled that "[b]ecause these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*." *S.D. Warren v. Board of Env. Protection*, 868 A. 2d 210, 216 (Me. 2005) (emphasis in original). This Court disagreed, stating that one cannot "denationalize national waters by exerting private control over them." 547 U.S. 370, 379 n. 5.

The fact that portions of the rivers involved in this case are owned and operated by the District for flood control purposes is thus irrelevant to their status as "navigable waters" for purposes of the CWA.

It is undisputed that ***all*** segments of the Los Angeles and San Gabriel Rivers, including those in which the mass emission monitoring stations are located, are classified as "receiving waters" under the Petitioner's permit and the State of California's water quality standards. The Ninth Circuit itself recognized that all four of the watershed rivers are "navigable waters" within the meaning of the CWA. 673 F.3d at 898. The District does not "own" those rivers in the ordinary sense of the word. As a matter of both state and federal common law, pursuant to the "public trust" doctrine, the State of California holds all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. *Colberg, Inc. v. State of California ex rel. Dept. Pub. Works*, 67 Cal. 2d 408, 416 (1967) (quoting *People v. Gold Run Ditch & Min. Co.*, 66 Cal. 138, 151 (1884)). For federal law purposes, in accordance with the "equal footing" doctrine, absolute property in, and dominion and sovereignty over all of its navigable waters passed to the state upon its admission into the union. *Weber v. Board of Harbor Commissioners*, 85 U.S. 57, 65-66 (1873). The authority to manage and control the public use of those rivers can be delegated by the state to the District, but that responsibility does not carry with it ownership of the water flowing through those streams or of the pollutants added to those streams by other dischargers. *See generally Packer v. Bird*, 137 U.S. 661 (1891); *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892).

The locations of the mass emission monitoring stations within the four watershed rivers have been described and illustrated in each of the District's annual Stormwater Monitoring Reports from 2002 through the present.[6] The map of those locations in Fig. 2-1 from the most recent version of the report is reproduced in the Appendix to this brief. There is no valid basis in fact or law to distinguish the mass emission monitoring stations located in the Los Angeles River (S10) and the San Gabriel River (S14) from those in the Santa Clara River (S29) and Malibu Creek (S02). Because the portions of the rivers in which those stations are located are not distinct bodies of water from the downstream segments into which they flow, the Ninth Circuit's ruling in this case is in direct conflict with this Court's decisions in *Miccosukee* and *S.D. Warren* and should be reversed.

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[6] *See* http://dpw.lacounty.gov/wmd/NPDES/report_directory.cfm. Photographs of each of the mass emission sites are also provided in "Appendix C" to each of the annual reports.

II. IF NOT REVERSED, THE NINTH CIRCUIT'S RULING WOULD CAUSE SERIOUS DISRUPTION TO THE ENTIRE MUNICIPAL STORMWATER PROGRAM, AS WELL AS TO THE NPDES PERMIT PROGRAM IN GENERAL

A. Channelization Is a Common Feature of Urban Streams Throughout the Country.

Although it may be the most spectacular example, the Los Angeles River is hardly alone among urban streams that have been wholly or partially channelized for flood control purposes. "Changes to channel morphology are among the most common and visible effects of urban development on natural stream systems."[7] Urban streams are commonly modified to improve drainage, with straightening and lining to reduce friction, increase flow capacity, and stabilize channel position. *Id.* at 151. Following the adoption of the Flood Control Act of 1936, the U.S. Army Corps of Engineers took a leading role in the process lining urban rivers with concrete and confining them between levees to speed water past developed areas.[8]

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[7] National Research Council, *Urban Stormwater Management in the United States* 148 (2008).

[8] *See generally* Andrew Karvonen, *Politics of Urban Runoff: Nature, Technology and the Sustainable City* 2-10 (Cambridge, Mass., 2011).

The legacy of this work remains in place on urban rivers across the country.[9]

The Ninth Circuit's ruling that the County of Los Angeles and the LACFCD became responsible for all of the pollutants detected in the Los Angeles and San Gabriel Rivers when they flowed through a "channelized" portion of those waters would have a catastrophic impact on other cities, counties and flood control districts whose stormwater systems discharge to similarly modified urban streams across the country. Like the District, many of those local government entities exercise varying levels of "ownership" or "control" over the streams flowing through their jurisdictions. By statute, the meanings of terms such as "navigable waters," "discharge" and "point sources" applicable to the permit in this case are the same as those established by federal law and used in other states. Cal. Water Code § 13373. The definitions of "discharge" and "discharge of a pollutant" in the District's permit are identical with those set forth in 40 C.F.R. § 122.2, which are in turn based upon the statutory definitions in CWA §§ 502(12) and (16). If the District in this case is held to be liable for a "discharge" in violation of its permit and the CWA, the same liability could be assigned to any MS4 discharging to urban streams in other parts of the country.

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[9] Paul Stanton Kibel, ed., *Rivertown: Rethinking Urban Rivers* 144 (2007).

B. Other MS4 Permits Require Strict Compliance with Water Quality Standards.

The Respondents have argued that the impact of the Ninth Circuit's decision is limited to the individual permit at issue in this case, because it is dictated by the terms of the receiving water limitations and monitoring program that are unique to that permit. To the contrary, the Ninth Circuit's ruling that an exceedance of water quality standards measured at instream monitoring stations is sufficient to establish liability for violation of the CWA, without corresponding evidence that the relevant pollutants were discharged from specific outfalls owned or operated by the permittee, would have far-ranging and unacceptable consequences for MS4 operators and other NPDES permit holders throughout the country.

The CWA specifies that MS4 permits shall reduce the discharge of pollutants to the "maximum extent practicable," and does not require MS4 discharges to achieve strict compliance with state water quality standards. *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).[10] Nevertheless, several

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[10] In *Browner*, the Ninth Circuit suggested, in *dicta*, that EPA has the discretion to require strict compliance with water quality standards where necessary to protect water quality. It did *not* say this discretion could be exercised without regard to the "maximum extent practicable" limitation established in CWA § 402(p)(3)(B)(iii). That issue has been litigated in a number of venues around the country, but is not presented here. The CWA gives individual states, such as California, the authority to impose requirements more stringent than federal law. The *amici*

(Continued on following page)

states other than California, and some EPA regions, have chosen to issue MS4 permits that either "prohibit" or "do not authorize" any discharge that would cause or contribute to an exceedance of water quality standards. In Ohio, the language used in the Phase I permits for the Cities of Akron, Toledo and Dayton "does not authorize" discharges that would "cause or contribute to in-stream exceedances of water quality standards." Permit No. 3PI00002*CD (June 13, 2011), at 2, Part I-C.f (Akron); Permit No. 1PI00003*DD (September 12, 2011) at 2, Part I-C.5 (Dayton); Permit No. 2PI00003*CD (June 25, 2010), at 5, Part I-B.5 (Toledo).[11] In Maryland, the Phase I permits for Montgomery County and for the City of Baltimore state that the County "shall not cause" a violation of the state's narrative water quality standards. Permit 06-DP-3320 (February 16, 2010) at 17, Part VI-A ("Discharge Prohibitions and Receiving Water Limitations") (Montgomery County); Permit 99-DP-3315 (January 3, 2005) (City of Baltimore) at 13, Part VI-A (Baltimore).[12] In Massachusetts and New Hampshire (where the NPDES program has not been delegated to the states and is administered by U.S. EPA), the

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urge the Court to reserve any discussion of this issue for an occasion when it is properly raised for briefing by the parties and resolution by the Court.

[11] All three permits are available at: http://www.epa.state.oh.us/dsw/storm/ms4_index.aspx.

[12] Both permits are available at: http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Pages/programs/waterprograms/sedimentandstormwater/storm_gen_permit.aspx.

Phase II "Small MS4 General Permit" issued by EPA Region 1 states that any discharges that would cause or contribute to instream exceedances of water quality standards "are not authorized." Small MS4 General Permit (April 18, 2003) at 3, Part I-B.2.k.[13]

In jurisdictions such as these, therefore, any finding that discharges from the MS4 are causing or contributing to an exceedance of applicable standards would place the permittee in immediate noncompliance. Likewise, many of these and other jurisdictions require instream sampling, either alone or in combination with traditional end-of-pipe outfall monitoring, to assess the impact of municipal stormwater discharges on receiving streams. If not reversed, the Ninth Circuit's holding in this case that instream sampling results alone are sufficient to establish liability for exceedances on the part of MS4 operators would establish a precedent that could have unacceptable consequences in any of those jurisdictions.

C. Instream Monitoring Serves a Different Function than Monitoring of Individual Outfalls.

Since the inception of the National Pollutant Discharge Elimination System ("NPDES") nearly forty years ago, the program as administered by U.S. EPA

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[13] Available at: http://www.epa.gov/region1/npdes/permits/permit_final_ms4.pdf.

and delegated state agencies has focused on establishing, and monitoring compliance with, both water quality-based and technology-based effluent limitations at each outfall through which a permittee discharges to the receiving waters. EPA's implementing regulations in 40 C.F.R. Part 122 consistently use the term "outfall" as the point at which limits are to be imposed and compliance is to be measured. For example, 40 C.F.R. § 122.45(a) states that "[a]ll permit effluent limitations, standards and prohibitions shall be established for each outfall or discharge point of the permitted facility. . . ." EPA's "NPDES Permit Writers' Manual" states that:

> Effluent monitoring locations should provide a representative sample of the effluent being discharged into the receiving water. . . . Most importantly, the point where a final effluent limitation applies and the point where monitoring is required must be the same. A logical effluent monitoring point is just before discharge to the receiving water.

EPA-833-K-10-001 (September 2010), at 8-5 to 8-6.[14]

"Instream" monitoring, on the other hand, is used to document the cumulative effect of multiple dischargers on the overall status of water quality in a receiving stream, and whether the stream itself is in attainment of applicable water quality standards. It

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[14] Available at: http://cfpub.epa.gov/npdes/writermanual.cfm?program_id=45.

can also be used to evaluate long-term trends in water quality over time. Instream monitoring to assess the overall effectiveness of the "best management practices" ("BMPs") being implemented by MS4 operators and long-term trends in receiving water quality is a common element in many MS4 permits around the United States. For example, the Phase I permit for the City of Portland, Oregon, includes instream monitoring as part of the monitoring program requirements for each co-permittee, to "[e]valuate status and long-term trends in receiving waters associated with MS4 stormwater discharges" and to "[a]ssess the chemical, biological and physical impacts of MS4 stormwater discharges on receiving waters." Permit 101314 (January 31, 2011), Schedule B, 1.a.iii-iv and Table B-1.[15] Similarly, the state of Maryland requires chemical, biological and physical monitoring at selected outfalls "and associated instream stations" to document progress towards meeting watershed restoration goals in its Phase I MS4 permits for several entities, including Montgomery County and the City of Baltimore. Permit 06-DP-3320 (February 16, 2010) at 9-10, Part III-H.1 (Montgomery County); Permit 99-DP-3315 (January 3, 2005) (City of Baltimore), at 8-9, Part III-H.1. The Phase I MS4 permit for the City of Akron, Ohio requires both outfall and instream sampling at specified locations for its wet weather monitoring program. The instream

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[15] Available at: http://www.deq.state.or.us/wq/stormwater/municipalph1.htm.

stations are sampled monthly, and the stormwater outfalls 3 times per year. Permit No. 3PI00002*CD (June 13, 2011), at 30-31 (Part V, Tables 3 and 4). The permit for the City of Dayton allows the city to use an "In-stream Biological Monitoring Option" in lieu of continuing its conventional wet weather monitoring program in order to identify impacts of MS4 discharges on water bodies, assess effectiveness of BMP practices, identify water quality improvements or degradation, and identify sources of pollutants. Permit No. 1PI00003*DD (September 12, 2011), at 30, Part IV-A.3.

In the present case, the purpose of the instream "mass emission" monitoring component of the permit's overall monitoring program is threefold: (1) to estimate the mass emissions from the MS4 [defined as the entire system operated by all 86 co-permittees], (2) to assess trends in the mass emissions over time, and (3) to determine if the MS4 is contributing to exceedances of water quality standards by comparing results to the applicable standards "*and with emissions from other dischargers.*"[16] Monitoring and Reporting Program CI 6948 for Order No. 01-182, section II-A. The mere fact that an exceedance of

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[16] Tellingly, the Ninth Circuit omits the last phrase from its discussion of the mass emission monitoring program in the District's permit. 673 F.3d at 888. But this phrase is critical, because without comparing the results with emissions from other dischargers, it is impossible to estimate the contribution of MS4 discharges to the level of pollutants measured instream.

applicable standards has been detected at one of the mass emission stations, without more, does nothing to establish whether the pollutants in question are being discharged from the portion of the MS4 operated by the District, from one of its municipal co-permittees, or from "other dischargers." Indeed, as explained in the Fact Sheet to the permit, the Regional Board decided in 2001 to add a new tributary monitoring program to the permit to determine pollutant sources and prioritize management actions. Fact Sheet/Staff Report for Order No. 01-182 (December 13, 2001) at 50. "Exceedances of various pollutants . . . have been occurring at the mass emission stations for many years, but there has not yet been an effort to monitor tributaries to determine *where the pollutants are actually coming from*." *Id.* (emphasis added).

If not reversed, the Ninth Circuit's holding that exceedances of water quality standards measured within the river are sufficient to impose liability on MS4 permittees, without regard to the proximity of any actual outfalls from their systems, not only misconstrues the purpose of the mass emission component of the District's monitoring program, but threatens to wreak havoc in the administration of the MS4 permit program nationwide. In fact, it would throw a monkey wrench into the long-established approach to NPDES permitting and enforcement in general, which relies upon setting limits and measuring compliance for all permittees at the point of discharge from their outfalls into the receiving

waters. The District Court's decision in this case properly emphasized the need to show that some amount of standards-exceeding pollutant is being discharged through at least one District outfall into the receiving stream to establish that the District was responsible for violation of the permit. *See* March 2, 2010 Order at 12-13; April 26, 2010 Order at 3. The Ninth Circuit would hold the District liable for discharges to the rivers from its co-permittees and from other permitted and non-permitted sources, regardless of whether they were transmitted through a portion of the MS4 operated by the District (i.e., its own MS4 outfalls, as opposed to the rivers themselves). Neither the permit in this case, nor the Clean Water Act and its state and federal implementing regulations can justify this result, and the Ninth Circuit's decision should be reversed.

CONCLUSION

The Ninth Circuit's ruling in this case is inconsistent with relevant decisions of this Court, the decisions of other circuits, the structure of the CWA and the regulations governing the MS4 permit program. If allowed to stand, it would have serious negative

consequences for municipal stormwater permittees throughout the country, and it must be reversed.

Respectfully submitted,

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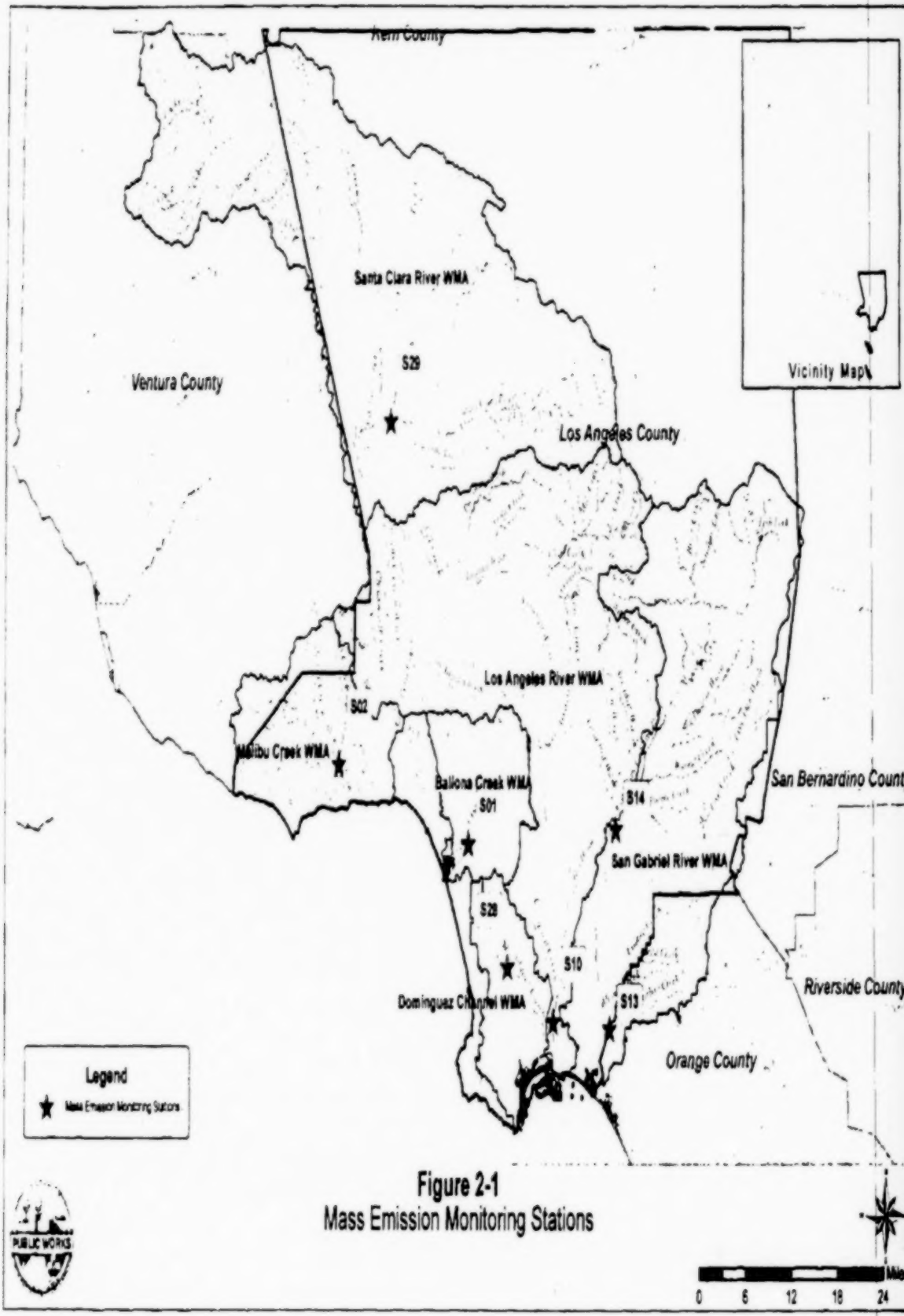

Figure 2-1
Mass Emission Monitoring Stations

AMICUS CURIAE BRIEF

No. 11-460

In The

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

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September 13, 2012

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *Amicus Curiae* brief in support of Petitioners.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members (see Appendix A). NAHB was a petitioner in another Clean Water Act ("CWA") case, *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007).

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[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity other than a*micus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. The parties have given consent and the letters of consent to file this brief are on file with the Court.

Under the CWA, every construction site greater than one acre in size (or smaller if it is part of a common plan of development greater than one acre) must obtain a permit for its stormwater discharges. EPA regulates these discharges pursuant to the same CWA section that it regulates municipal separate storm sewer systems ("MS4s")—33 U.S.C. § 1342(p). Thus, NAHB's members will be impacted if the Court concludes that under the CWA a "point source" can also be legally defined as a "navigable water." 33 U.S.C. §§1362(14), (7).

SUMMARY OF ARGUMENT

For all its complexity, the Clean Water Act is simple in one respect—it creates liability for a person who adds pollutants to a "water of the United States" through a "point source." 33 U.S.C. §§ 1311(a), 1362(5), (6), (7), (12), (14). In this case, though the concrete lined portions of the Los Angeles and San Gabriel Rivers are "point sources," the Respondents have failed to prove those point sources "add" pollutants to a water of the United States.

ARGUMENT

This case involves water that flows from the natural portions of the Los Angeles and San Gabriel Rivers into two concrete lined structures created in areas where the Rivers had once flowed naturally. The water then flows out of those concrete structures back into natural portions[2] of the same Rivers—

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[2] There is no dispute that the natural portions of each River are Clean Water Act "navigable waters" or "waters of the United States." 33 U.S.C. 1362(7).

downstream from the structures.[3] The structure in the Los Angeles River is approximately 51 miles in length and the structure in the San Gabriel River is approximately 9 miles long.[4] Furthermore, along those structures there exist "outfalls" where stormwater enters the concrete structures.

In addition, there are mass emissions monitoring stations in each river. The station in the Los Angeles River is located in the concrete lined portion of the River. *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 889 (2011) (hereinafter *NRDC*). The San Gabriel station is located upstream from the concrete lined portion of the River where it has a rip rap bank. *Id.*

Finally, amicus understands that there is no evidence that the amount of pollutants in the flowing water is greater at the outlets of the concrete structures then at their inlets.

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[3] Amicus will use the term "outlet" to describe the water that flows out of the two concrete lined structures and back into the natural portions of the Los Angeles and San Gabriel Rivers, and the term "outfalls" to describe water that enters those concrete structures through various storm drains.

[4] While the Los Angeles River is concrete lined almost its entire length, the San Gabriel is not. However, the San Gabriel is concrete lined, between Firestone Boulevard and just above the San Diego Freeway. Above the concrete lined area, the San Gabriel has rip rap banks and a natural bottom. Below the concrete area, the San Gabriel is tidally influenced. County of Los Angeles Dept. of Public Works, *A Common Thread Rediscovered, San Gabriel River Corridor Master Plan*, 2-30, 3-29, 3-31, 3-35 (June 2006), available at http://ladpw.org/wmd/watershed/sg/mp/docs/SGR_MP.pdf (last visited August 30, 2012).

Amicus addresses the following issues: 1) whether the concrete structures are "point sources" or "navigable waters" under the CWA, and 2) whether the outlets from the structures cause a "discharge of a pollutant." 33 U.S.C § 1362 (7), (12), (14). NAHB urges the Court to hold that structures that are "point sources" cannot also be legally defined as "navigable waters" and to hold that the Respondents failed to prove a discharge of pollutants occurred.

I. THE CONCRETE STRUCTURES ARE "POINT SOURCES" NOT "WATERS OF THE UNITED STATES."

A. Congress Specifically Designated "Channels" as "Point Sources."

Exercises in construction "begin with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Obedience to text is especially due when Congress defines statutory terms: "When a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000); *see also W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 502 (1945) ("statutory definitions of terms . . . prevail over colloquial meanings"); *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) ("Statutory definitions control the meaning of statutory words . . . .").

The CWA's regulatory scheme, for all its detail, is quite simple: Congress intended to regulate pollutants going into "navigable waters" by requiring permits to control pollutants coming out of "point

sources." 33 U.S.C. § 1311(a) (prohibiting the "discharge of pollutants" unless permitted elsewhere in the Act). CWA § 1362 defines two key terms: "navigable waters" at subsection (7) and "point source" at subsection (14). 33 U.S.C. §§ 1362(7), (14).[5] The term "'point source' means *any* discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, *channel*, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14)(emphasis added). Congress could not have been more explicit: a "point source" is any defined, discrete conveyance, from which pollutants are or may be discharged. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("Tellingly, the examples of 'point sources' listed by the Act include pipes, ditches, tunnels, and conduits ....").

Congress was not, however, as clear in its definition of "navigable waters." The term "navigable waters" means "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The courts have held that the term "navigable waters" goes beyond navigable-in-fact waters, *Rapanos v. U.S.*, 547 U.S. 715, 723-25 (2006) but "the Act was not clear what non-navigable waters it intend[s] to cover." *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 212 (4th Cir. 2009). *See also United States v. Moses*, 496 F.3d 984, 988

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[5] A third statutory definition ("discharge of a pollutant") shows that "point source" and "navigable waters" are mutually exclusive categories. This is discussed at pages 11-12 infra.

(9th Cir. 2007), *cert. denied*, 554 U.S. 918 (2008) (providing that while the terms "navigable waters," and "waters of the United States" "are designed to bring clarity to the Nation's waters, they, themselves, are not hyaline."). Unlike the "point source" definition, which identifies specific features, no specific kind of waterbody is listed in the "navigable waters" definition; that broad term may include bays, lakes, sounds, gulfs, rivers, streams and even certain non-navigable wetlands. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

When interpreting the CWA's definitional provisions, specific statutory provisions (such as the definition of "point source") govern over more general provisions (such as the "navigable waters" definition). *See, e.g., Edmond v. United States*, 520 U.S. 651, 657 (1997); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The Court applied this canon of statutory construction in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), where it analyzed whether a patent infringement suit had to be brought in the judicial district where the defendant corporation committed acts of infringement, under 28 U.S.C. §1400(b), or where the defendant corporation was doing business, under 28 U.S.C. § 1391(c). The Court explained that § 1400(b) was specifically applicable to patent infringement cases, whereas § 1391(c) is a general corporation venue statute. In determining that § 1400(b) controlled, it held that "[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco*, 353

U.S. at 228 (internal quotes omitted). Likewise, in *United Ass'n of Journeymen and Apprentices of Plumbing and Pipe Fitting Indus., AFL-CIO v. Reno*, 73 F.3d 1134 (D.C. Cir. 1996) (hereinafter "*Reno*"), labor unions argued that aliens, operating from a foreign-owned derrick barge on the Continental Shelf could not construct oil platforms without complying with United States immigration laws. The Court of Appeals reviewed 43 U.S.C. §§ 1333(a)(1) and 1356. Section 1333 (a)(1) generally extended the Constitution and laws of the United States to "'all installations and other devices permanently or temporarily attached to the seabed,'" *id.* at 1135 (quoting the Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 203, 92 Stat. 629, 635), while § 1356 directed the Coast Guard to develop rules requiring "'any vessel, rig, platform, or other . . . structure' used in regulated operations on the outer Continental Shelf be 'manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the United States for permanent residence.'" *Id.* at 1136 (internal citation omitted). Section 1356(c), however, was an exception providing that "Americans would not have to man or crew any vessel . . . 'over 50 percent of which is owned by citizens of a foreign nation . . . .'" *Id.* Interpreting these two provisions and relying on the canon of statutory construction that specific statutory provisions trump general ones, the Court of Appeals explained:

> [Section] 1333(a)(1) is written in general terms. It does not expressly refer to nonimmigrant workers or to the immigration laws. In contrast, § 1356

> lays out a detailed system governing who may work on vessels and structures conducting regulated activities on the outer Continental Shelf, a system drawing distinctions between citizens and resident aliens and other workers and vesting discretion in the President to restrict or relax § 1356's rules on the composition of the workforce. The canon of statutory construction dictating that specific statutory provisions govern general ones would therefore lead us to favor § 1356 over § 1333(a)(1). *Id.* at 1140.

It is no different here. Clearly, the concrete lined portions of each river are "channels." Channels are explicitly included in the definition of "point source," and because the more general provision ("the navigable waters" definition) does not even refer to channels, the explicit definitions must prevail. A manmade channel cannot be a statutory "navigable water." *See Fourco Glass Co.*, 353 U.S. at 228 (Congress "specifically dealt with [channels] in another part of the same enactment.") (internal citations omitted). The precise inclusion of "channel" in the "point source" definition precludes an interpretation that channels are somehow penumbral to the "navigable waters" definition.

B. The CWA's Definitional Framework Illustrates that "Any" Channel is a "Point Source."

The manner in which the Supreme Court interpreted the definition of "air pollutant" in the Clean Air Act ("CAA") is instructive as to how the

CWA's "point source" definition should be interpreted, given the nearly identical structure of these statutory provisions.

In *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), the Court directed EPA to decide whether carbon dioxide ("CO2") and other greenhouse gases ("GHGs") cause or contribute to climate change. In reaching this decision, the Court construed the CAA's definition of "air pollutant," which provides:

> *The term* "air pollutant" *means any* air pollution agent or combination of such agents, *including any* physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

42 U.S.C. § 7602(g) (emphasis added).

In comparison, under the CWA:

> *The term* "point source" *means any* discernible, confined and discrete conveyance, *including but not limited to any* pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal

> feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added).

In *Massachusetts*, the Court held that GHGs fit within the CAA's definition of "air pollutant." The majority explained that the CAA's definition of "air pollutant" was "sweeping" and "capacious," and that "[o]n its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word 'any.' Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical ... substance [s] which [are] emitted into ... the ambient air.' The statute is unambiguous." 549 U.S. at 529.[6]

The CWA's definition of "point source" is similarly unambiguous. Like the CAA's "air pollutant" definition, the "point source" definition begins with a broad description of the defined term and then provides a non-exclusive list of examples. Following the statutory construction analysis employed by the *Massachusetts* Court, because "point source" means "any" discrete conveyance,

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[6] The *Massachusetts* majority cited *Dep't of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) for the proposition that "'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." (some internal quotation marks omitted).

"including . . . any . . . channel," then *any channel* must be a "point source." "On its face, the definition embraces all [channels] of whatever stripe, and underscores that intent through the repeated use of the word 'any.'" *Massachusetts*, 549 U.S. at 529.

C. The CWA Definition of "Discharge of a Pollutant" Shows that "Point Source" and "Navigable Waters" Are Mutually Exclusive.

The statutory definition of "discharge" drives home the point that Congress did not intend "point sources" to be "navigable waters." The Act provides: "'[D]ischarge of a pollutant' . . . means . . . any addition of any pollutant *to* navigable waters *from* any point source ...." 33 U.S.C. § 1362(12) (emphasis added). Several points stand out following a plain reading of this language. First, "point sources" are not themselves "navigable waters," but are features that convey pollutants and add them to "navigable waters." Second, Congress did not require permits to discharge pollutants into "point sources;" it only authorized permits for discharges into "navigable waters."

The CWA controls pollutant discharges through point source permit programs. CWA § 1342, the National Pollutant Discharge Elimination System ("NPDES"), requires point source operators to obtain permits for the addition of pollutants to "navigable waters." 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) ("The NPDES permit program was designed to control 'point sources' of pollution."). Pursuant to § 1342, EPA and 45 delegated States regulate

pollutants that exit "point sources." *Miccosukee*, 541 U.S. at 105 (explaining that "point sources" require permits when they add pollutants to "navigable waters"). Similarly, § 1344 of the CWA requires point source operators to obtain a Corps permit for discharges of a specific type of pollutant, namely, dredged or fill material. 33 U.S.C. § 1344. In short, operators must obtain § 1342 or 1344 permits when pollutants leave "point sources," and enter "navigable waters." The *Rapanos* plurality emphasized the importance of the statutory definitions. Referring to the definitions of "discharge of a pollutant" and "point source," the plurality concluded: "The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Rapanos*, 547 U.S. at 735 (2006). If "point sources" are simultaneously "navigable waters," then a discharge would ridiculously become either "any addition of any pollutant to navigable waters from any [*navigable waters*]," or "any addition of any pollutant to [*point sources*] from any point source[s]." 33 U.S.C. § 1362(12).

D. Municipal Separate Storm Sewer Systems are "Point Sources," not "Navigable Waters."

The County's MS4 is permitted under 33 U.S.C. § 1342(p). In 1987, Congress amended the CWA and added § 1342(p) which, among other things, required EPA to develop regulations for an MS4 permit

program regarding stormwater discharges.[7] By putting the MS4 program in § 1342, Congress expressed its intent that MS4s are "point sources." EPA thereby defined "MS4" to track the Act's "point source" definition. *Compare* 33 U.S.C. § 1362(14) (*supra* at 4), *with* 40 C.F.R. § 122.26(b)(8).[8] Courts also recognize that storm sewers are "point sources" subject to NPDES permitting requirements. *Natural Res. Def. Council, Inc. v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir.1977).

To manage the pollution from MS4s, Congress further required that permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design, and engineering methods." 33 U.S.C. § 1342(p)(3)(B)(iii).[9] Modern MS4s are waste treatment systems because they reduce pollutants by treating stormwater with such features as settling structures to collect sediment, and racks to capture trash. *Tons of L.A. River trash will be captured*

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[7] *See* 33 U.S.C. §§ 1342(p)(3)(B), (4). The history of the MS4 permit program, and its phased approach for regulation of municipalities based on their population size, is traced in *Envtl. Def. Ctr., Inc. v. U.S. Envtl. Prot. Agency,* 344 F.3d 832, 841-42 (9th Cir. 2003).

[8] EPA defines MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, *man-made channels* or storm drains)" owned and operated by a State or municipality and "[d]esigned or used for collecting or conveying storm water ...." 40 C.F.R. § 122.26(b)(8) (emphasis added).

[9] "Best management practices" include "treatment requirements." 40 C.F.R. § 122.26(d)(iv)(D).

before it hits the sea, http://latimesblogs.latimes.com/lanow/2011/11/massive-la-river-trash-capturing-project-completed.html (last visited July 20, 2012); Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993); *Design and Construction of Urban Stormwater Management Systems* 454, 489-511 (Am. Soc'y of Civil Eng'rs 1992). Indeed, EPA identifies stormwater as a "waste."[10] The key point is this: EPA expressly excludes "waste treatment systems" from the definition of "waters of the United States" 40 C.F.R. § 122.2. Thus, when a third party discharges into an MS4, which itself discharges directly into a "navigable water," EPA "always addresses such discharges as 'discharges *through* [MS4s]' as opposed to 'discharges to waters of the United States.'" 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis supplied).

Amicus also cautions the Court to consider the ramifications of determining that an MS4 is a water of the United States. If true, all of the CWA's requirements and programs for "navigable waters" would be triggered for MS4s. But "statutes should be interpreted to avoid ... unreasonable results whenever possible." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). For example, § 1313 requires States to adopt and submit to EPA water quality standards ("WQSs"), 33 U.S.C. § 1313, which "consist

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[10] 40 C.F.R. § 122.26(b)(8)(i) (MS4 is a conveyance system owned and operated by a municipality with jurisdiction over the "disposal of sewage, industrial wastes, storm water, *or other wastes*") (emphasis supplied).

of a designated use or uses for the waters of the United States ...." 40 C.F.R. § 131.3(i). If MS4s are "navigable waters," then § 1313 requires States to develop WQSs and "designated uses" for the water in municipal sewer systems.

This requirement creates two major problems. First, the amount of resources that the states would need to expend to develop WQSs for every section of MS4 in their state would be astronomical.[11] Second, the main purpose (or "use") of an MS4 is to transport stormwater (a waste) away from upland areas. However, using a "navigable water" in such a manner would plainly violate EPA's regulation that provides: "[i]n no case shall a State adopt waste transport ... as a designated use for any waters of the United States." 40 C.F.R. § 131.10(a).

"[A] statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998). *See also Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (court should "find that interpretation which can most fairly be said to be imbedded in the statute [and is] ... most harmonious with its scheme and with the general purposes that Congress manifested"). Section 1342(p)'s structure and EPA's regulations make clear that MS4s are "point sources," not "navigable waters." Accordingly, because the concrete lined portions of the Los Angeles and San Gabriel Rivers are considered to be part of the Los Angeles County MS4, *NRDC*, 673 F.3d at 889, they must be legally

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[11] This would total over 3,300 miles in the Los Angeles Flood Control District alone. *NRDC*, 673 F.3d at 884.

defined as "point sources" and not "navigable waters."

E. The CWA Distinguishes Between Conveying Pollutants and Adding Pollutants.

The Court of Appeals misreads the CWA by stating that the "Clean Water Act does not distinguish between those who add and those who convey what is added by others . . .." *NRDC*, 673 F.3d at 900. Congress provided that "point sources" are conveyances "from which pollutants are *or may be discharged*." 33 U.S.C. § 1362(14) (emphasis added). However, § 1311(a) in combination with § 1362(12) only makes it unlawful for a person to actually "add" a pollutant to a water of the United States. 33 U.S.C. §§ 1311(a), 1362(12); *Nat'l Pork Producers Council v. U.S.E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011) ("The[ ] cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority."); *Waterkeeper Alliance, Inc. v. U.S. E.P.A.* 399 F.3d 486, 505 (2d Cir. 2005) (explaining that the Act does not regulate potential discharges of pollutants, only actual discharges). Congress did not create liability for "conveying" pollutants. Thus, the language of the Act indicates that a conveyance can be a "point source" and not actually "discharge" anything.

For example, assume a person places a culvert in a single natural water of the United States that runs underneath a road from side A to side B. A culvert is a metal pipe that is capable of adding pollutants to side B. Therefore, it satisfies the definition of a

"point source." 33 U.S.C. § 1362(14). The culvert, however, simply conveys the water from side A of the road to side B in the same waterbody. The water that exits the culvert does not constitute a "discharge" because any pollutants that exit the culvert would have ended up in side B naturally and are already present in the waterbody. Thus, the culvert (a point source) "conveys" pollutants, but does not "add" them. Furthermore, the CWA does not create liability for the person because she did not discharge pollutants into side B.

* * *

As shown above, the concrete lined portions of the San Gabriel and Los Angeles Rivers clearly fall within the CWA definition of "point source." Moreover, the structure and requirements of the CWA suggest that those conveyances cannot also be defined as "navigable waters."

II. NO DISCHARGE HAS BEEN PROVEN.

In *Miccosukee,* the Court addressed whether pumps that moved water from canals, over a levy and into a reservoir required an NPDES permit because they added pollutants to a water of the United States. The Court explained that to be a "point source" a confined discrete conveyance need only convey pollutants; it does not need to be the original source of the pollutants. *Id.* at 105. However, the Court also held that if the pumps simply moved water within the same waterbody, no addition of pollutants occurred and thus, no NPDES

permit was necessary. *Id.* at 109-112.[12] Thus, the rule that arises from *Miccosukee* is that a "point source" that simply conveys pollutants within a single waterbody, and does not itself increase the amount of pollutants, does not cause an "addition of pollutants" and does not cause a "discharge." 33 U.S.C. § 1362(12).

Unlike *Miccosukee*, in this case there is no dispute that the concrete conveyances connect two natural portions of the Los Angeles and San Gabriel Rivers, respectively. Thus, under *Miccosukee*, if the two concrete conveyances (the point sources) simply convey pollutants, no addition of pollutants and therefore no "discharge" occurs at the outlets. If however, the concrete conveyances increase (add) the amount of pollutants, then an addition and discharge does occur at their outlets.

In *Miccosukee*, it was understood that the pumps did not add any pollutants that were not already present in the canals. *Miccosukee,* 541 U.S. at 105. In this case the only evidence of pollutants comes from mass emission stations. *Natural Res. Def. Council, Inc. v. County of Los Angeles*, No. 08-1467, 2010 WL 761287, at *7 (C.D. Cal. Mar. 2, 2010); *NRDC,* 673 F.3d at 888 (9th Cir. 2011). And it is unclear whether the concrete conveyances add pollutants that were not present in the upper natural portion of the two rivers.

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[12] There was, however, a factual dispute concerning whether the canals and reservoir were the same, or distinct waterbodies. Therefore, the Court remanded the matter back to the Court of Appeals. *Id.*

The Los Angeles River mass emission station is located near the outlet of the concrete channel. *Supra* p. 3. Thus, there is evidence of pollutants in the point source and evidence that those pollutants flow into the downstream natural portions of the River. However, those pollutants may have been present in the upper natural portion of the River. Thus, like the culvert example, the concrete conveyance may simply convey those pollutants downstream.

In comparison, the San Gabriel River mass emission station is located in a channelized portion of the River, but upstream of the concrete lined structure. *Supra* p. 3. Thus, there is evidence of pollutants above the concrete structure, and one can infer that those pollutants flowed through the concrete lined channel back into the natural portion of the San Gabriel River. However, there is no evidence that the amount of pollutants increased between the station and the outlet of the structure. In addition, the pollutants detected at the station were likely present in the natural portion of the San Gabriel River above the station, and therefore the concrete lined structure merely conveys those pollutants downstream.

"To establish a violation of the [CWA's] NPDES requirements, a plaintiff *must prove* that defendants 1) discharged, i.e., added 2) a pollutant 3) to navigable waters 4) from 5) a point source." *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir.1993) (emphasis added); *see also Gwaltney of Smithfield, LTD. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (explaining that at trial plaintiffs must prove their

allegations). The lower courts agreed that the Petitioner violated the Act if it discharged pollutants in violation of the permit. Amicus submits that Respondents have not proven a discharge, because they have not submitted evidence of an addition of a pollutant.[13]

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[13] Respondents may have been able to meet their burden in at least two ways. As suggested by the District Court, if they had had taken samples from at least one outfall, then they could have asserted that the concrete lined point sources do "add" pollutants where the outlets connect to the natural waterbodies; or they could have taken samples before and after the concrete lined structures and shown that the amount of pollutants leaving the structure was higher than entering it—thus proving the concrete structures "add" pollutants. *See, Natural Res. Def. Council, Inc.*, 2010 WL 761287, at *8 n.11.

CONCLUSION

The definition of "point source" is broad and covers the distinct concrete lined channels located in the Los Angeles and San Gabriel Rivers. However, the evidence in this case does not prove that those point sources added any pollutants to the natural rivers. Thus, amicus respectfully submits that the Court should vacate the lower court's decision.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New*

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AMICUS CURIAE BRIEF

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No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND SANTA MONICA BAYKEEPER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL HYDROPOWER ASSOCIATION, NORTHWEST HYDROELECTRIC ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION, EXELON CORPORATION, FIRSTLIGHT POWER RESOURCES, PACIFICORP, PORTLAND GENERAL ELECTRIC COMPANY, PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PUBLIC UTILITY DISTRICT NO. 2 OF GRANT COUNTY, WASHINGTON, SABINE RIVER AUTHORITY OF TEXAS, AND SABINE RIVER AUTHORITY STATE OF LOUISIANA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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INTERESTS OF HYDROPOWER *AMICI CURIAE*

National Hydropower Association ("NHA"), Northwest Hydroelectric Association ("NWHA"), American Public Power Association ("APPA"), Exelon Corporation ("Exelon"), FirstLight Power Resources ("FirstLight"), PacifiCorp, Portland General Electric Company ("PGE"), Public Utility District No. 1 of Chelan County, Washington ("Chelan PUD"), Public Utility District No. 2 of Grant County, Washington ("Grant PUD"), Sabine River Authority of Texas and Sabine River Authority State of Louisiana ("SRAs") (together "Hydropower *Amici*") represent electric utilities and hydropower project owners and operators from across the nation, as well as others who rely on such projects that may be affected by the Court's decision in this case.[1] In particular:

NHA is a non-profit national association dedicated exclusively to advancing the interests of the United States hydropower industry, including conventional, pumped storage, and new hydrokinetic technologies. NHA seeks to secure hydropower's place as a clean, renewable and reliable energy source that serves national environmental and energy policy objectives. NHA's membership consists of more than 180 organizations including public power utilities, investor-

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[1] Pursuant to Rule 37.6, Hydroelectric *Amici* state that no counsel for either party to this case authored this brief in whole or in part, and no person other than *amici* and their members made monetary contributions to the preparation and submission of this brief. The parties have consented to the filing of this brief and consent letters accompany this brief.

owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has over 80 members from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

APPA is a national organization representing the interests of more than 2,000 not-for-profit, community-owned electric utilities throughout the United States that deliver electric energy to approximately 46 million citizens, or 15 percent of the population. Hydroelectric projects comprise over 17 percent of public power's total generation.

Exelon owns and operates two hydroelectric power plants along the Susquehanna River in Maryland and Pennsylvania, with power generation of more than 1,600 megawatts ("MW"). Exelon also has ownership interests in two other hydroelectric power plants located in Pennsylvania and California.

FirstLight owns and operates several conventional and pumped storage hydroelectric stations in New England. FirstLight's conventional projects include the multi-development 119 MW Housatonic River Project, the 2 MW Scotland Project in Connecticut, and the 68 MW Turners Falls Project in Massachusetts, Vermont, and New Hampshire. FirstLight's pumped storage

stations include the 1,120 MW Northfield Mountain Project in Massachusetts and the 29 MW Rocky River development within the Housatonic River Project in Connecticut.

PacifiCorp is a regulated public utility providing electrical services to residential, commercial, and industrial customers in the States of Oregon, Washington, California, Idaho, Wyoming, and Utah. PacifiCorp owns and operates 44 hydroelectric plants and serves as the operator for two additional hydroelectric projects. PacifiCorp's hydroelectric projects have an installed capacity of about 1,145 MW, which represents approximately eight percent of the company's annual power generation.

PGE is a public utility organized under the laws of Oregon, headquartered in Portland, Oregon. PGE provides electric services to residential, commercial, and industrial customers in the State of Oregon. PGE owns and operates three hydroelectric projects in Oregon, namely the Clackamas River Project, the Pelton Round Butte Project and the Willamette River Project, with their associated dams on the Clackamas River, the Deschutes River and the Willamette River, respectively. PGE's hydroelectric projects produce clean, renewable energy to serve its customers and enhance recreation for the people of Oregon and its visitors.

Chelan PUD's three hydroelectric dams produce clean, renewable energy to serve local customers and for delivery to utilities that serve customers across the Pacific Northwest. Two of Chelan PUD's hydro projects, Rocky Reach and Rock Island, are part of an

11-dam network on the United States portion of the Columbia River. The Rocky Reach Project has 11 generating units with a generator nameplate capacity of 1,300 MW. The Rock Island Project has 10 generating units in the original powerhouse and eight units in a second powerhouse with a total generator nameplate capacity of 629 MW. Chelan PUD's third hydro project, the Lake Chelan Project, empties into the Columbia River and has two generating units with a total generator nameplate capacity of 59 MW.

Grant PUD owns and operates two large hydroelectric power plants on the Columbia River, the Priest Rapids Dam and the Wanapum Dam, with a total generating capacity of nearly 2,000 MW. Grant PUD provides electricity to its customers and sells over 60 percent of the total generating capacity of these facilities to other wholesale purchasers throughout the Pacific Northwest. Grant PUD received a new 44-year license from the Federal Energy Regulatory Commission ("FERC") to operate the facilities in April 2008.

The SRAs are state entities (created by the States of Texas and Louisiana) that are charged, under their respective authorizing statutes, to control and regulate the flow of the Sabine River, and to finance, construct, and operate the Toledo Bend Project, located along the Sabine River on the Texas-Louisiana border. The Toledo Bend Project is the only hydropower facility in the United States that is co-licensed to two states through governmental units of those states.

Hydropower projects are an important source of electric power, accounting for approximately seven

percent of national electric production each year and two-thirds of the country's renewable energy.[2] Hydroelectric dams impound water in a reservoir or divert water out of the stream for release through turbines for the production of electricity. In addition to electricity production, the nation's hydropower projects provide numerous other benefits to the communities where they are located, such as municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat.

Almost all non-federally-owned hydropower projects are subject to the Federal Power Act's ("FPA") comprehensive regulatory regime. Congress enacted the FPA (and its predecessor statute, the Federal Water Power Act of 1920) in order "to secure a comprehensive development of national resources." *First Iowa Hydro-Electric Cooperative v. F.P.C.*, 328 U.S. 152, 180-81 (1946). Under the FPA, FERC has exclusive authority to issue licenses authorizing the construction, operation, and maintenance of new and existing hydroelectric projects.[3] *See* §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, and 817 (2006). In carrying

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[2] U.S. Energy Information Administration, Electric Power Annual 2011, Summary Statistics for the United States, 1999 through 2010 (Mar. 2012), http://www.eia.gov/electricity/annual/pdf/tablees1.pdf; U.S. Energy Information Administration, Electricity Net Generation From Renewable Energy by Energy Use Section and Energy Source, 2004-2008 (Aug. 2010), http://www.eia.gov/cneaf/solar.renewables/page/_rea_data/table1_11.pdf.

[3] Federally operated projects, such as those operated by the Tennessee Valley Authority, Army Corps of Engineers, and the Bureau of Reclamation are not licensed by FERC.

out its statutory responsibilities, FERC is required to consider all of the factors affecting the public interest in the comprehensive development of a waterway, including appropriate conditions to protect the environment. *See* §§ 4(e), 10(a)(1), 16 U.S.C. §§ 797(e), 803(a)(1).

To encourage and attract the enormous amount of capital required to develop hydropower, Congress included safeguards in the FPA to help ensure positive returns on investments. For example, FPA § 15(a)(1) requires that licenses be issued on reasonable terms, including economic terms. 16 U.S.C. § 808(a)(1). Under FPA § 6, FERC is authorized to issue licenses with terms of up to 50 years and is prohibited from amending licenses, once they are accepted, without the consent of the licensee. *Id.* § 799; *Pacific Gas & Electric Co. v. F.E.R.C.*, 720 F.2d 78, 83-84 (D.C. Cir. 1983). FPA § 28 restricts the authority to alter the terms of a license, or otherwise impair the rights of the licensee, once a license has been issued. 16 U.S.C. § 822.

In addition to the FPA, hydropower projects are now subject to the requirements of a variety of environmental statutes, such as the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Endangered Species Act, the Coastal Zone Management Act, the Federal Land Policy and Management Act, and the National Historic Preservation Act. FERC-licensed hydropower projects are also subject to § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341 (2006). This provision requires an applicant for federal approval to conduct an activity that may result in a discharge into navigable

waters to obtain a water quality certification from the state in which the discharge will occur. This certification is intended to ensure that the discharge will comply with a state's water quality standards. If this certification is granted, FERC may issue the license subject to any terms and conditions contained in the certification. *See PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 722 (1994). Licensees must obtain a new § 401 certification each time that the hydropower project is relicensed. *See S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 374-75 (2006); 33 U.S.C. § 1341(a)(1). By contrast, hydropower dams generally are not subject to the CWA's § 402 National Pollution Discharge Elimination System ("NPDES") program, which requires that any person who discharges pollutants from a point source to waters of the United States obtain an NPDES permit. *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982).

In this case, Petitioner Los Angeles County Flood Control District ("District") operates the MS4,[4] a complex flood-control and storm-sewer conveyance system used to collect and channel stormwater runoff originating from upstream municipalities. Appendix to

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[4] Under federal regulations, an MS4 is "a conveyance or system of conveyances (including roads with draining systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)" that is (i) owned or operated by a state or other public body, (ii) used for collecting or conveying storm water, (iii) is not a combined sewer, and (iv) which is not part of a Publicly Owned Treatment Works." 40 C.F.R. § 122.26(b)(8) (2012).

Petition for Writ of Certiorari ("App.") 1-97. The MS4 is subject to a NPDES permit which governs municipal stormwater discharges in Los Angeles County. As required by the NPDES permit, the District owns and operates a number of mass emissions monitoring stations to test the quality of water passing through the MS4. Neither the MS4 nor the monitoring stations located therein add pollutants to the water that is conveyed, yet water passed through the MS4 contains levels of pollutants exceeding those authorized by the NPDES permit.

Natural Resources Defense Council and Santa Monica Baykeeper brought a CWA citizens suit, alleging that the District was discharging polluted stormwater from the monitoring stations located in the MS4 containing pollutant levels exceeding the limits allowed by the NPDES permit. App. 4, 53. The district court granted summary judgment in favor of the District, concluding that there is "no evidence clearly establishing that the District is discharging pollutants from any given point source at or near the monitoring stations." App. 119. The U.S. Court of Appeals for the Ninth Circuit reversed. The court concluded that water originating from a navigable river and passing through a "man-made construction" into the natural river below is a "discharge of a pollutant" under the CWA. App. 44-45, 91. Discounting the fact that the water already contained pollutants before its conveyance by the District, the court stated that the CWA "does not distinguish between those who add and those who convey what is added by others—the [CWA] is indifferent to the originator of water pollution." App. 45-46, 92-93.

This interpretation of the CWA could suggest, contrary to well-established precedent, that hydroelectric dams might also be subject to NPDES requirements. Dams, like the MS4 here, are man-made constructions in the stream and discharge water downstream through various means including turbines, conveyances, pipes, and spill over the dams. The Ninth Circuit's interpretation of the CWA is of particular concern, because hydropower projects, while not adding pollutants to navigable waters, often convey water containing pre-existing pollutants; yet, under the Ninth Circuit's reasoning, that mere conveyance could subject hydropower dams to NPDES permitting. Hydropower *Amici* believe that the Ninth Circuit's decision is incorrect and warrants reversal.

Requiring hydropower dam projects that convey water with pre-existing pollutants and within the same water body now, 30 years after enactment of the CWA, to obtain NPDES permits would create a regulatory trainwreck neither authorized nor contemplated by Congress when it passed the CWA. NPDES permits, which must be obtained every five years, could interfere with FERC-issued long-term licenses that reflect the comprehensive balancing of public interest factors, and that already contain compliance requirements designed to protect the full panoply of environmental interests, including water quality (*e.g.*, the § 401 water quality certification and terms and conditions), recreation, and fish and wildlife habitat. Adding new and potentially conflicting environmental requirements on a hydropower dam every five years when the dam is not itself adding any pollutants to the stream would further complicate an already very complex regulatory scheme for FERC-licensed

hydropower projects, and threatens licensees' certainty of investment.

Hydropower *Amici*, therefore, request that the Court reverse the Ninth Circuit's decision, and avoid the unintended consequences of that decision that could subject dam operators who do not add any pollutants from the outside world to the NPDES permitting program.

SUMMARY OF ARGUMENT

The passage of pre-existing pollutants in a water of the United States through a man-made construction does not constitute an "addition" of a "pollutant" "from" a point source requiring an NPDES permit. The Ninth Circuit's conclusion to the contrary, finding that water passing through a man-made construction in a single river constitutes a "discharge of pollutants" into waters of the United States, is inconsistent with this Court's precedents and has broad implications for public and private sectors, including hydropower dam owners.

Under the Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109-110 (2004), a mere transfer of water between two points of a single body of water does not constitute the "addition of pollutants" to a navigable water of the United States. As the Eleventh Circuit Court of Appeals noted on remand in the same case, if the water "wound up where it would have gone anyway," there is no discharge into navigable waters requiring an NPDES permit. *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210, 1221 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643

(2010) (citing *Consumers Power*, 862 F.2d 580 and *Gorsuch*, 693 F.2d 156). Contrary to the Ninth Circuit's opinion, the channelized portion of the river at issue is part of the same water body, and the conveyance of water by the District downstream, "where it would have gone anyway," does not "add" pollutants to the water.

Moreover, to qualify as a discharge, a pollutant must be introduced from the "outside world." Operators of stormwater conveyance systems, hydropower dams, and others with man-made constructions within a navigable river that do not add pollutants from the "outside world," are simply conveying water downstream through their infrastructure. Imposing an NPDES requirement on man-made constructions that merely convey water without adding pollutants from the outside world would inappropriately expand the scope of the NPDES program. This has been recognized by the Environmental Protection Agency ("EPA") in its "Water Transfers Rule," noting that water passing through a dam does not require an NPDES permit because a discharge from a hydropower dam does not result in an "addition of a pollutant" unless the dam itself discharges a pollutant such as grease into the water passing through the dam. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 & n.3 (June 13, 2008) ("Water Transfers Rule").

Under long-standing precedent, hydroelectric dams are not subject to NPDES permits. Under the Ninth Circuit's decision, passage of water through a man-made improvement such as a dam could constitute an

"addition of pollutants," and the owner of such a structure could be responsible for obtaining and complying with an NPDES permit, making that owner inappropriately responsible for pollutants added to the navigable water by upstream dischargers.

ARGUMENT

I. THE CONVEYANCE OF PRE-EXISTING POLLUTANTS THROUGH A MAN-MADE IMPROVEMENT WITHIN A NAVIGABLE RIVER DOES NOT CONSTITUTE AN "ADDITION" OF A POLLUTANT TO NAVIGABLE WATERS.

A. The Clean Water Act NPDES Program.

The CWA is designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] Section 301(a) of the CWA prohibits

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[5] 33 U.S.C. § 1251(a). The CWA is the title now used for the Water Pollution Control Act of 1948, which is the title Congress used in 1948. Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155. In 1965, Congress significantly amended the 1948 act with the passage of the Water Quality Act of 1965. Pub. L. No. 89-234, 79 Stat. 903. In 1970, Congress passed the Water Quality Improvement Act of 1970. Pub. L. No. 91-224, 84 Stat. 91. Congress comprehensively overhauled the program and developed § 402, by passing the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. *See Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981); *Fairview Township v. EPA*, 773 F.2d 517, 519 (3d Cir. 1985). It then amended the Act in 1977. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566. In the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76, Congress again amended the Act and

any person from adding pollutants from a point source to waters of the United States without a permit under the Act, such as an NPDES permit under § 402.[6] *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982); *Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981); *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980); *EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976); *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 7 (1976). NPDES permits must be obtained from either the EPA or the appropriate state permitting agency operating under an EPA-approved program.[7] Permits under § 402 require that the discharger adhere to certain technology and water quality based requirements, and permits are issued for a term of five years. 33 U.S.C. § 1342(b)(1)(B).

Five elements must be present for a particular activity to trigger the proscription in § 301(a), and the need for a permit under § 402. 33 U.S.C. § 1311(a). These elements principally derive from the definition of a "discharge of a pollutant." Section 502(12) of the Act defines the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable

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demonstrated a renewed interest in water quality-based standards and in state nonpoint source controls. *See Natural Res. Def. Council v. EPA*, 915 F.2d 1314, 1318 (9th Cir. 1990).

[6] 33 U.S.C. §§ 1311(a), 1342(a). EPA regulations require any person who discharges or "proposes to discharge pollutants" to apply for an NPDES permit. 40 C.F.R. § 122.21(a).

[7] Pursuant to § 402(b) of the CWA, EPA may grant a state § 402 permitting authority. 33 U.S.C. § 1342(b).

waters [*i.e.*, "waters of the United States"] from any point source."[8] An activity triggering § 402, therefore, must involve the (a) addition of, (b) a pollutant,[9] (c) by a person, (d) into the waters of the United States, (e) from any point source.[10]

The issue before this Court is whether the activity by the District constitutes an "addition" of a "pollutant" "into the waters of the United States." The court below concluded that it did, reasoning that a discharge of a pollutant occurs when the point source simply conveys water that is already polluted from one upstream portion of the navigable river, through a system of channels, to another portion of the same navigable river. App. 45, 92 (holding that "[a] discharge from a point source occurred when the still-polluted stormwater flowed out of the concrete channels . . .

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[8] 33 U.S.C. § 1362(12)(A). The definition also means "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.* § 1362(12)(B).

[9] The term pollutant is broadly defined and means: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). *See Weinberger*, 456 U.S. at 307-09 (bombs dropped during military training).

[10] Section 502(14) defines a point source as meaning "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

through an outfall, and into the navigable waterways.").

B. The Ninth Circuit's Decision Improperly Expands the Scope of the Clean Water Act.

The Ninth Circuit's decision incorrectly expands the scope of the CWA to require that operators of man-made improvements in waters of the United States must now be responsible for upstream pollutants that pass through their systems, even if the operators add nothing to the water of the United States from "the outside world."

The Ninth Circuit concluded that the conveyance of water with pre-existing pollutants through the District's MS4 system and the monitoring stations therein made the District responsible for violations of the NPDES permit. The court reasoned that the MS4 divided the navigable river into two distinct water bodies, and a discharge occurred when the polluted stormwater flowed out of the MS4 and back into the navigable river. In response to the District's arguments that it added no pollutant to the water, the court found that the CWA "does not distinguish between those who add and those who convey what is added by others—the [CWA] is indifferent to the originator of water pollution." App. 45-46, 92-93.

The Ninth Circuit's decision ignores this Court's holding in *Miccosukee* that a transfer of water between two points of a single body of water does not constitute the "addition of pollutants" to a navigable water of the United States. *Miccosukee*, 541 U.S. at 109-110. While *Miccosukee* addressed whether the two bodies of water

at issue were separate and distinct, the Court observed that, if the identified water sources "are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." *Id.*; *see also S.D. Warren*, 547 U.S. at 381. This Court supported its conclusion by quoting a Second Circuit NPDES case, noting that "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot. . . ." *Miccosukee*, 541 U.S. at 110 (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)).

The Ninth Circuit nevertheless concluded that a discharge of a pollutant occurred, because the MS4, a man-made construction, in effect divided the navigable river into two. The court reasoned that a "discharge from a point source occurred when the still-polluted stormwater flowed out of the [MS4], through an outfall, and into the navigable waterways." App. 44-45, 91-92 ("As a matter of law and fact, the MS4 is distinct from the two navigable rivers; the MS4 is an intra-state man-made construction—not a naturally occurring Watershed River."). Contrary to the Ninth Circuit's decision, the District's MS4 system does not divide the navigable river into two distinct water bodies. A man-made construction in a navigable river does not change the river's navigable water status. *See Miccosukee*, 541 U.S. at 109-110. Hydropower dams, for example, are located on navigable rivers and passage of water from one side of the dam to the other does not constitute a "discharge" into "waters of the United States" for purposes of § 402 of the CWA. *See, e.g., Gorsuch*, 693 F.2d at 175. In this case, the navigable river was

channelized for flood control purposes, but the river remains a single navigable river despite this man-made improvement. And, pursuant to *Miccosukee*, the transfer of water within a single navigable water does not constitute a "discharge" into "waters of the United States" for purposes of liability under § 402 of the CWA. *Miccosukee*, 541 U.S. at 109-110.

Even if this Court finds that the MS4 divided the navigable river into two distinct bodies, EPA has made clear since this Court's opinion in *Miccosukee* that a water transfer, *i.e.* "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," does not subject the discharge to an NPDES permit. 40 C.F.R. § 122.3(i); Water Transfers Rule, 73 Fed. Reg. at 33,697. In *Miccosukee*, this Court held that the conveyance of water between water bodies that are not "meaningfully distinct" did not require an NPDES permit. *Miccosukee*, 541 U.S. at 109-110. In response to the United States' arguments that mere conveyance of water between two distinct water bodies also did not add pollutants because they were already present in the water, the Court reserved judgment, noting that EPA had yet to articulate its position on this theory. *Id.* at 107-109. A year later, in an August 2005 Agency Interpretation, EPA confirmed its long-held policy that "Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES

authorities, rather than the permitting program under section 402 of the CWA."[11]

In June 2008, EPA issued a final rule codifying its policy that water transfers between navigable waters that do not subject the water to an intervening use do not constitute an "addition of pollutants" to navigable waters and are not subject to NPDES permits. Water Transfers Rule, 73 Fed. Reg. at 33,697. EPA noted in its rule that "water transfers" only involve a conveyance from one water of the United States to another. EPA also found that conveyance of water through a dam is not an intervening use. *Id.* at 33,705. It also clarified that "movements of water within a single water body are also not subject to NPDES permitting requirements," as held in the *Miccosukee* case. *Id.* at 33,699. The U.S. Court of Appeals for the Eleventh Circuit correctly upheld the Water Transfers Rule. *Friends of the Everglades*, 570 F.3d 1210. The Ninth Circuit's opinion, if upheld, could undermine EPA's Water Transfers Rule and its long-standing policy that transfers between navigable waters that are not subject to an intervening use do not constitute "an addition" of pollutants subject to an NPDES permit.

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[11] EPA, Agency Interpretation on Applicability of Section 402 of the CWA to Water Transfers at 3 (Aug. 5, 2005), http://www.epa.gov/ogc/documents/water_transfers.pdf.

II. THE NINTH CIRCUIT'S DECISION, IF UPHELD, COULD DISRUPT LONGSTANDING JUDICIAL PRECEDENT THAT HYDROPOWER DAMS ARE GENERALLY NOT SUBJECT TO REGULATION UNDER § 402 OF THE CLEAN WATER ACT.

Hydropower *Amici* acknowledge that the District was subject to an NPDES permit and the issue in this case is liability for violations of that permit. In addressing whether the District violated the NPDES permit, however, the Ninth Circuit altered the established meaning of "discharge of a pollutant" under the CWA. Hydropower *Amici* believe that the Ninth Circuit's opinion, if upheld, could expand the scope of § 402 to other types of facilities, such as hydropower dams, that Congress did not intend to be regulated by § 402.

Most non-federal hydropower dams are subject to the jurisdiction of FERC. These facilities are issued new licenses by FERC every 30 to 50 years, and once they are accepted, FERC is prohibited from amending licenses without the consent of the licensee. 16 U.S.C. § 799; *Pacific Gas & Electric*, 720 F.2d at 83-84. In addition, hydropower facilities are usually subject to one or more state water quality certifications under § 401 of the CWA; those certifications typically mandate conditions for the protection of water quality. The FERC license, which by law incorporates any § 401 conditions, dictates the environmental requirements for operation of the hydropower facility for the duration of the 30-50 year license. Licensees must obtain a new § 401 certification each time the hydropower project is relicensed (*see S.D. Warren*, 547 U.S. at 374-75; 33

U.S.C. § 1341(a)(1)), and when seeking certain amendments. *See Alabama Rivers Alliance v. F.E.R.C.*, 325 F.3d 290, 292 (D.C. Cir. 2003).

Sections 401 and 402 of the CWA are fundamentally different in scope. Section 401 requires a certification if the activity "may result in any discharge into the navigable water[s]" of the United States. 33 U.S.C. § 1341(a)(1). This Court in *S.D. Warren* observed that § 401's "terms have a broad reach, requiring state approval any time a federally licensed activity 'may' result in a discharge. . . ." 547 U.S. at 380. Section 402, conversely, requires a NPDES permit for the "discharge of any pollutant" into the navigable waters of the United States. 33 U.S.C. § 1342(a). Noting the differences between the sections in *S.D. Warren*, this Court explained that "[t]he triggering statutory term [in § 402] is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water." 547 U.S. at 380-81.

Since the passage of the CWA, hydropower dams generally have not been subject to NPDES permits, unless they physically "add" pollutants from the outside world, such as the discharge of grease or oil from a pipe. *Gorsuch*, 693 F.2d at 165 n.22. Both the D.C. and Sixth Circuits have found that water flowing through dams does not "add" pollutants for purposes of § 402 of the CWA. *See Consumers Power Co.*, 862 F.2d at 586; *Gorsuch*, 693 F.2d at 175. The court in *Consumers Power Co.* observed that EPA's interpretation that the pollutant must be introduced from the "outside world" is a permissible construction of the CWA. 862 F.2d at 584. *See also Appalachian*

Power Co. v. Train, 545 F.2d 1351, 1377 (4th Cir. 1976); *Gorsuch*, 693 F.2d at 174-175; *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982) (dam induced pollution); *United States ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F.2d 992, 999 (6th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984) (same); *see Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied*, 513 U.S. 873 (1994) (regulated point source can be found when the point source did not merely pass pollution from one body of navigable water into another).

Sound reasons support Congress' decision to deliberately exempt hydropower dams from the § 402 NPDES permit program. Pollutants that are "added" from the outside world by the point source are amenable to end-of-the-pipe technology-based effluent limitations, and water quality-based requirements. The presence and quantity of such pollutants is readily ascertainable, because it is the point source itself that is creating or causing the pollutant to be introduced. This is not true when a man-made construction, like a dam, is simply passing along already-polluted water within a single water of the United States. The presence or quantity of such "pollutants" can and does vary depending upon the actions of third parties, the climate, atmospheric deposition, land use practices, or, sometimes, the soil. Developing and implementing specific technology-based effluent limitations to achieve acceptable treatment levels would be untenable for activities that do not themselves create the waste or otherwise add pollutants from the outside world. These activities can neither control nor anticipate what

pollutants might pass through their systems and at what levels.

The scope of § 401 allows for regulation of all aspects of water quality. *See PUD No. 1 of Jefferson County*, 511 U.S. at 712. Neither the CWA's language nor purpose warrants subjecting hydropower dams to additional regulation under § 402. Further, conditions attached to a NPDES permit may well duplicate or conflict with those attached to the § 401 water quality certification that is incorporated into the FERC license, or with the FERC license conditions themselves, which are carefully crafted to balance environmental protection and other public interest considerations. *See* 16 U.S.C. § 803(a).

Moreover, because NPDES permits expire every five years, EPA or the state permitting authority could reevaluate and revise the water quality conditions at regular intervals, requiring dam owners to control pollutants that are released by upstream dischargers. *See* 33 U.S.C. § 1342(a)(3), (b)(1)(B); 40 C.F.R. § 122.46(a), (b). This "moving target" of environmental responsibility affects a dam owner's certainty of investment, and sometimes leads to lengthy, regular litigation. *See, e.g., Upper Blackstone Water Pollution Abatement District v. EPA*, No. 11-1474, 2012 U.S. App. LEXIS 16145 (1st Cir. Aug. 3, 2012). Requiring an NPDES permit proceeding every five years when a dam is not itself adding any pollutant from the outside world would complicate an already complex regulatory scheme for FERC-licensed hydropower projects and would present substantial inchoate liability for licensees over the term of the license. *See Consumers Power Co.*, 862 F.2d at 590 ("EPA regulation would not

add anything superior to existing FERC regulation. . . .").

More importantly, if the Court upholds the Ninth Circuit's interpretation that owners of man-made constructions are responsible for pollution in the water they merely convey through their structures within a single water body, the CWA will be transformed. First, it will expand – and in effect eviscerate – the concept of "addition of a pollutant" under § 402. The courts have found that "addition of a pollutant" requires the physical addition of a pollutant from the outside world. *Gorsuch*, 693 F.2d at 165 n.22. However, the Ninth Circuit's interpretation would expand this meaning of "addition" under § 402 to include any conveyance of already-polluted water within a single water body without the physical addition of anything into the water. Second, while the CWA does not purport to directly regulate nonpoint source pollution, it will in effect do so by regulating the non-responsible parties that merely convey the water downstream. Congress did not intend for all activities that contribute to pollution to be addressed with the issuance of permits under the NPDES program. Congress' use of the phrase "discharge of a pollutant" contemplates an effort to address the manner in which "pollutants" are introduced into the receiving waters. It is not synonymous with the term "pollution," which is a much broader term.[12] Nonpoint source pollution generally

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[12] "Pollution" is more broadly defined than "pollutant" and includes "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19).

refers to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987); *see also Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998). Nonpoint source activities that may cause or contribute to pollution may well be issues that are appropriate for states to address,[13] but those activities are not subject to § 402. Man-altering changes in the normal flow of surface water is a classic example of one area where Congress understood that "pollution" might occur, yet understood that it would not be treated as the addition of a pollutant from a point source.[14] The Ninth Circuit's opinion, if upheld by this Court, would expand the scope of the CWA to regulate nonpoint source pollution through the regulation of facilities that merely convey the pollution downstream, contrary to Congress' intention in enacting the CWA.

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[13] Congress generally left the control of nonpoint source pollution with the states under Section 319 of the CWA. 33 U.S.C. § 1329. Indeed, Congress initially contemplated through Section 208 of the CWA that states would develop area-wide plans to address pollution. *Id.* § 1288. *See generally* Raymond A. Sales, *Implementing Section 208: What Does it Take – A Report on Growth Management and Water Quality Planning*, 11 Urb. Law. 604 (1979); *see also* 33 U.S.C. § 1251(b), (g) (discussing "pollution" and the role of the states).

[14] House Comm. On Public Works, Federal Water Pollution Control Act Amendments of 1972, H.R. Rep. No. 92-911, at 109 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3718-19, *and in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 796 (1973).

Hydropower *Amici* urge the Court to find that man-made constructions in navigable waters do not "add a pollutant" to waters of the United States under the CWA when passing already-polluted water through the structure.

CONCLUSION

For the reasons set forth above, Hydropower *Amici* respectfully request that the Court reverse the Ninth Circuit's decision and hold that, under § 402 of the CWA, man-made constructions that convey water containing pre-existing pollutants within a single body of water, are not responsible for a "discharge of pollutants" under the CWA.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 11-460

In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL AND SANTA MONICA BAYKEEPER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, HUDSON RIVER FISHERMEN'S ASSOCIATION NEW JERSEY CHAPTER, CATSKILL MOUNTAIN CHAPTER OF TROUT UNLIMITED, THEODORE GORDON FLYFISHERS, INC., AND AMERICAN WHITEWATER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Clean Water Act regulates the discharge of pollutants from point sources into the waters of the United States, including pollutants discharged from municipal separate storm sewer systems. 33 U.S.C. §1342(p). The question presented by the petition for certiorari is:

> When water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river constructed for flood and stormwater control as part of a municipal separate storm sewer system, into a lower portion of the same river, can there be a "discharge" from an "outfall" under the Clean Water Act, notwithstanding this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that transfer of water within a single body of water cannot constitute a "discharge" for purposes of the Act?

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INTEREST OF AMICI CURIAE

Amici curiae submit this brief in support of Respondents, the Natural Resources Defense Council, Inc. ("NRDC") and the Santa Monica Baykeeper ("Baykeeper").[1] Recreational water-users throughout the United States rely on clean, safe and healthy waterways for fishing, hunting, rafting, canoeing, kayaking, swimming and other water-based activities. Recreational fishing, hunting and paddling generates tens of billions of dollars of economic activity annually and supports hundreds of thousands jobs across the Country. OUTDOOR INDUSTRY ASSOCIATION, THE OUTDOOR RECREATION ECONOMY 17 (2012), *available at* http://www.outdoorindustry.org/images/researchfiles/OIA_OutdoorRecEconomyReport2012.pdf?167. Every day, *amici* outdoor recreationists are on or in streams, rivers, lakes, bays and estuaries across the Country. Few Americans use and depend on safe and healthy waterways more than *amici*. However, polluted stormwater creates health and safety hazards to recreational water-users, diminishes fish and wildlife habitat, reduces opportunities for beneficial use and recreational enjoyment of the Nation's waters, and reduces the

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[1] Counsel for *amici curiae* National Wildlife Federation et al. authored this brief in its entirety, and no person or entity other than the *amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Both the Petitioner and the Respondents have provided written consent, on file with the clerk, to the filing of briefs in support of either, or neither, party.

economic benefits generated by recreational water use.

Amici's interests in protecting beneficial uses of the Nation's waters are directly impacted by the outcome of this case. Reducing stormwater pollution is essential to ensuring that recreational use and enjoyment of the Nation's coastal and inland waters are protected for current and future generations. Enforcement of the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program is fundamental to achieving stormwater pollution reduction. *Amici* are concerned that allowing the District to escape liability for violations of its municipal separate storm sewer system (MS4)[2] NPDES permit will compromise long-term stormwater management goals nationwide and undermine the purpose of the CWA. Amici are concerned this would result in increased pollution from stormwater runoff and further jeopardize fish and wildlife habitat, degrade water quality and increase health and safety risks to recreational water-users across the Country. Such an outcome

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[2] MS4s are the system of storm drains, pipes, tunnels and channels that collect and convey untreated stormwater from rooftops, streets, highways, parking lots and other impervious surfaces. MS4s can be highly interconnected and complex. The District's MS4 is comprised of over 500 miles of open channels and 2,800 miles of storm drains–the number and location of which "are too numerous to catalogue." *Natural Res. Def. Council v. Cnty of Los Angeles*, 673 F.3d 880, 884 (9th Cir. 2011).

would result in direct and negative impacts on *amici's* interests.

The National Wildlife Federation ("NWF") is the largest member supported wildlife conservation organization in the Country. NWF works to improve and conserve wildlife habitat and water quality for the next generation of anglers, hunters, and wildlife conservationists. With over four million members, partners and supporters, NWF has been the conservation voice for anglers, hunters, scientists, and outdoor enthusiasts since its founding in 1936.

The Hudson River Fishermen's Association New Jersey Chapter ("HRFANJ") represents the interests of recreational fishermen who utilize the Hudson River, the New York Bight and its surrounding water system. HRFANJ encourages the responsible use of aquatic resources in recreational sportfishing and has worked to protect fisheries habitat by reducing industrial and other sources of pollution in the Hudson River through enforcement of the CWA since its founding in 1969.

Catskill Mountains Chapter of Trout Unlimited ("CMCTU") works to protect and restore coldwater fisheries throughout the Catskill mountain region of New York State through stream clean-up and restoration projects, conservation and stream restoration trainings, active involvement in environmental review processes, and advocacy of clean water and fisheries issues through legal action.

Theodore Gordon Flyfishers, Inc. ("TGF") is one of the oldest organizations of flyfishers dedicated to conservation in New York State and has worked to protect and preserve cold water fisheries since its founding in 1963. TGF's members fish throughout waterways within New York State, including the Hudson River estuary and Long Island Sound, as well as river and marine fisheries across the United States.

American Whitewater ("AW") works to protect and restore America's rivers and enhance opportunities for the safe enjoyment of America's whitewater resources through legislative advocacy, public education, organization and promotion of river stewardship programs. Founded in 1954, AW is the primary advocate for the preservation and protection of whitewater rivers throughout the United States representing individual whitewater enthusiasts, river conservationists and over 100 local paddling groups.

THE STORMWATER POLLUTION PROBLEM

Urban stormwater runoff is one of the largest sources of pollution to surface waters in the United States. Rooftops, roadways, parking lots, driveways and other impervious surfaces prevent rain water and snow melt from infiltrating the ground. Instead, the water flows across the urban landscape and accumulates heavy metals, nutrients, pathogens, bacteria, pesticides, salts, trash, rubber, oil and grease, and other pollutants. *See, e.g.*, UNITED STATES ENVIRONMENTAL

PROTECTION AGENCY, PRELIMINARY DATA SUMMARY OF URBAN STORM WATER BEST MANAGEMENT PRACTICES, Ch. 4 (2006) *available at* http://water.epa.gov/scitech/wastetech/guide/stormwater/upload/2006_10_31_guide_stormwater_usw_b.pdf [hereinafter EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES]; Jennifer K. Gilbert & John C. Clausen, *Stormwater Runoff Quality and Quantity from Asphalt Paver, and Crushed Stone Driveways in Connecticut*, 40 WATER RESEARCH 826 (2006) [hereinafter Gilbert & Clausen]. Polluted stormwater flows untreated into streams, rivers, lakes, bays and estuaries through MS4s. The negative impacts of untreated stormwater pollution on water quality, fish and wildlife habitat and human health are significant and wide ranging. These impacts all result in diminished recreational opportunities.

The United States Environmental Protection Agency ("EPA") estimates that "urban runoff was the leading source of pollutants causing water quality impairment related to human activities in ocean shoreline waters and the second leading cause in estuaries across the nation." EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-1. EPA estimates that approximately 5,000 square miles of estuaries, 1.4 million acres of lakes, and 30,000 miles of rivers are impaired due to urban runoff. *Id.* "Urban runoff accounts for 47 percent of impaired miles of surveyed ocean shoreline, 46 percent of the impaired square miles of surveyed estuaries, 22 percent of the impaired acres of

surveyed lakes and 14 percent of the impaired miles of surveyed rivers." *Id.* at 4-23.

The type of pollutant and the corresponding concentration levels entering receiving waters are influenced by a variety of factors, including the surface over which stormwater flows and the rate and frequency of precipitation events. *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE ENVIRONMENT 3-6 (2008) *available at* http://www.epa.gov/ncea/roe/docs/roe_final/EPAROE_FINAL_2008.PDF [hereinafter EPA REPORT ON THE ENVIRONMENT]. Fine particles of heavy metals such as copper and zinc accumulate on roadways from normal wear and tear of cars, trucks and construction equipment and materials. *See* EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-16; *see also* Gilbert & Clausen 826-27. Roadways with high traffic volumes accumulate higher levels of these pollutants–particularly in areas that receive infrequent rain events (such as Los Angeles). When rain events do occur, stormwater runoff becomes highly concentrated with pollutants that have accumulated on the urban landscape. Just one rain event can lead to severe toxicity concentration spikes adversely impacting water quality and pose significant risk to aquatic species and human health.

The accumulation of heavy metals in river, stream and lake sediments is associated with increased heavy metal concentrations in fish. *E.g.*,

K.R., Campbell, *Concentrations of Heavy Metals Associated with Urban Runoff in Fish Living in Stormwater Treatment Ponds*, 27 ARCHIVES ENVIRONMENTAL CONTAMINATION & TOXICOLOGY 353-55 (1994). As concentrations increase they can become toxic to fish and cause mortality, impair reproductive ability and also threaten human health. Fish consumption advisories are often issued due to heavy metal concentrations deemed unfit for human consumption. *See* EPA REPORT ON THE ENVIRONMENT 3-59 (discussing heavy metal concentrations in fish and fish consumption advisories).

Nutrients such as nitrogen and phosphorous from lawn fertilizers or automobile exhausts are carried by stormwater runoff and negatively impact receiving waters. EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-9. The cumulative impacts of nutrient loading are manifest in algae blooms, decreased water clarity, and reduced dissolved oxygen levels, which can prove fatal to fish. Algal blooms also cause illness and discomfort in people through skin or eye contact. Red tide–a type of algal bloom–can lead to shellfish poisoning and respiratory irritation in humans. EPA REPORT ON THE ENVIRONMENT 3-58. These impacts accumulate over time and degrade water quality and fish and wildlife habitat, and pose health risks to recreational water-users.

Pathogens and bacteria such as *E. coli, giardia lamblia,* and *cryptosporidium* are picked up by

stormwater runoff and can enter storm drain systems from animal wastes, failing septic systems, atmospheric deposition or illicit discharges. The potential for public health risk increases when runoff is discharged to recreational waters such as beaches, rivers and lakes, or where runoff comes into contact with shellfish beds. EPA URBAN STORM WATER BEST MANAGEMENT PRACTICES 4-13, 14. A groundbreaking study conducted in Santa Monica Bay showed that water contaminated with high bacteria counts dramatically increases the risk of gastrointestinal illness, diarrhea with blood, earaches, nasal congestion and skin rash. R. Haile, et al., *An Epidemiological Study of Possible Adverse Human Health Effects of Swimming in Santa Monica Bay* 5 (1996). The risk of exposure to illnesses from pathogens and bacteria is especially high for fishermen, kayakers, rafters and other paddlers who come in direct contact with the waters in which they recreate on a daily basis.

Reducing the discharge of pollutants from MS4s is critical to ensuring that fish and wildlife habitat are protected and that the health and safety of recreational water-users are not at risk each time a fisherman, hunter, paddler or swimmer enters the water. The CWA requires, *inter alia,* NPDES permits for MS4 discharges. 33 U.S.C. §1342(p)(3)(B). Enforcement of these permits is critical to reducing polluted stormwater runoff and ensuring that beneficial uses of the nation's waterways are protected for current and future generations of recreational water-users.

SUMMARY OF ARGUMENT

This case does not raise the legal issue of whether there is a "discharge of a pollutant" from the District's MS4 pursuant to this Court's holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The only legal relevance of the term "discharge of a pollutant" is to determine whether an NPDES permit is required. Because there is no dispute among the parties that the District discharges pollutants into the waters of the United States, and that the CWA subjects the District to NPDES permitting requirements under section 402(p), the application of *Miccosukee* to this case is inapposite.

Section 1365(a) of the CWA establishes that effluent limitations and other conditions set forth in an NPDES permit create obligations on the part of NPDES permittees that are enforceable by citizens. The District's permit prohibits stormwater discharges from the District's MS4 that cause or contribute to water quality standard violations. The permit also requires the District to implement a monitoring and reporting program to determine whether discharges from the MS4 cause or contribute to water quality standards violations and to design and implement control techniques and best management practices to ensure that pollution in stormwater runoff is reduced to the maximum extent practicable and complies with water quality standards. The terms of the permit are enforceable.

The CWA bars collateral challenges to the terms of an NPDES permit in an enforcement proceeding. 33 U.S.C. §1369(b)(2). This bar extends to State issued NPDES permits and collaterally estops the District from challenging the terms of its permit here.

Affirming the judgment of the Ninth Circuit would confirm that MS4 discharges are subject to the NPDES permitting requirements of the CWA, the terms of NPDES permits are enforceable, and those terms may not be collaterally challenged in an enforcement proceeding.

ARGUMENT

I. This Case Does Not Invoke A Miccosukee Analysis

This Court granted certiorari on the question of whether there can be a "discharge"[3] from an "outfall" when water flows from one portion of a river into a lower portion of the same river. The answer to this question is no. *Miccosukee*, 541 U.S. at 109. The answer to the question presented however is not relevant to whether stormwater discharges from the District's MS4 require an NPDES permit, a question that has already been answered definitively by Congress. 33 U.S.C. §1342(p).

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[3] 33 U.S.C. §1362(16) states "[t]he term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."

In *Miccosukee*, this Court was asked to determine whether pumping polluted water from one water body to another water body constitutes the discharge of a pollutant for the purpose of determining whether an NPDES permit is required. *See* 541 U.S. at 102-03 ("the question . . . is whether the operation of the S-9 pump constitutes the 'discharge of [a] pollutant' within the meaning of the Act"); *see also S.D. Warren Co. v. Maine Bd. Envtl. Protection et al.*, 547 U.S. 370, 381 (2006) ("[t]he question in *Miccosukee* was whether a pump between a canal and an impoundment produced a 'discharge of a pollutant' within the meaning of §402 . . .").

The only legal relevance of the statutory term "discharge of a pollutant" is to trigger the requirement that a person obtain an NPDES permit. *See* 33 U.S.C. §1311(a) (requiring a permit pursuant to §1342 for the "discharge of a pollutant"). Here, all parties agree that the District discharges pollutants from its MS4 into navigable waters of the United States and requires an NPDES permit.[4] Once the permitting requirement has been triggered, the interpretation of the term "discharge of a pollutant" as used in section 1311(a)

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[4] Stormwater discharges from MS4s require an NPDES permit. 33 U.S.C. §1342(p); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977) (EPA does not have discretion to exempt stormwater discharges from MS4s from NPDES permitting requirements).

does not govern what may be required in an NPDES permit under section 1342. Rather, those requirements are established by sections 1311(b), 1312, 1314, 1316, 1317 and 1342, which refer to effluent limitations and water quality standards, but which do not turn on the definition of the statutory term "discharge of a pollutant."

Since the District has an NPDES permit, and all parties agree that the District requires an NPDES permit, *Miccosukee* is not relevant to the question of whether the District's discharges violated the permit.

II. NPDES Permits Are Enforceable

Congress enacted the CWA to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). In order to achieve this goal, Congress declared "the discharge of any pollutant by any person shall be unlawful" except as in compliance with the CWA. 33 U.S.C. §1311(a). At the heart of the CWA is the NPDES permit program, which requires a permit with enforceable effluent limitations for every point source discharge of pollutants into waters of the United States. 33 U.S.C. §§1311, 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 101-02 (1992) ("The primary means of enforcing these [effluent] limitations and [water quality] standards is the NPDES, enacted in 1972 as a critical part of Congress' complete rewriting of federal water pollution law.").

The CWA provides that NPDES permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system design and engineering methods and other such provisions as the Administrator or State determines appropriate for the control of such pollutants." 33 U.S.C. §1342(p)(3)(B)(iii).

EPA regulations require, *inter alia*, MS4 operators to develop stormwater management programs ("SWMPs")[5] describing a permittee's relevant ordinances, other regulatory requirements and legal authority, and the programs and procedures that an MS4 operator will implement and enforce to comply with the permit. 40 C.F.R. §122.26(d).

This Court has explained that "an NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger . . ." *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976).

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[5] The District's Stormwater Quality Management Program ("SQMPs") is the same as a stormwater management program ("SWMPs") referred to in the Code of Federal Regulations.

The District's permit states that "[t]he objective of this Order is to protect the beneficial uses of receiving waters in Los Angeles County." CAL. REG'L WATER QUALITY CONTROL BD., LOS ANGELES REGION, ORDER NO. 01-182 at 20. To meet this objective, the permit transforms water quality standards set by the state of California into obligations with which the District must comply. "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." *Id.* at 24.

To determine whether discharges from the MS4 cause or contribute to the exceedance of water quality standards, the District, as the Principal Permittee, is responsible for implementing the permit's Monitoring and Reporting Program. CAL. REG'L WATER QUALITY CONTROL BD., LOS ANGELES REGION, MONITORING AND REPORTING PROGRAM FOR ORDER NO. 01-182 at T-6. This Program requires the District to monitor mass emissions from designated mass emission stations to, *inter alia*, "determine if the MS4 is contributing to exceedances of Water Quality Standards . . ." *Id.* Because discharges from the MS4 that cause or contribute to water quality standard violations are prohibited by the permit, mass emission monitoring results that show water quality standard exceedances demonstrate a violation of the permit. Permit violations are violations of the CWA. 33 U.S.C. §1342(k).

The CWA provides citizens the authority to enforce NPDES permits. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). Section 1365(a) provides that

> any citizen may commence a civil action on his own behalf (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by . . . a State with respect to such a standard or limitation.

The term "effluent standard or limitation" includes "(2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; and (6) a permit or condition thereof issued under section 1342 . . ." 33 U.S.C. §1365(f). The District's permit is enforceable and the District is obligated to comply with the terms of the permit. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 205.

III. NPDES Permits May Not Be Challenged In Enforcement Proceedings

The District's contention that it is not liable for permit violations in the Los Angeles River and the San Gabriel River is nothing more than a collateral challenge to the terms of the District's NPDES permit. The District, the County and many of the co-permittee municipalities challenged the validity of the permit in California state court. This

challenge failed and the California courts upheld the permit. *See Cnty of Los Angeles v. Cal. State Water Res. Control Bd. et al.*, 143 Cal. App. 4th 985 (Cal. Ct. App. 2006). The decision by the California courts collaterally estops the District from collaterally challenging the terms of its permit in this enforcement proceeding. 33 U.S.C. §1369(b)(2). *See General Motors Corp. v. EPA*, 168 F.3d 1377, 1383 (D.C. Cir. 1999) (holding that the bar against challenging the validity of a permit in an enforcement proceeding extends to permits issued by states as well).

Entertaining the District's collateral challenge to the terms of this permit will invite MS4 NPDES permit holders across the Country to challenge permit terms as a defense to enforcement actions. Such a result would fly in the face of Congressional intent, undermine the ability of regulators and the public to enforce NPDES permits and delay compliance with effluent limitations and water quality standards. This outcome would diminish fish and wildlife habitat, endanger public and environmental health and welfare, and reduce opportunities for the beneficial use and safe enjoyment of the Nation's waters.

CONCLUSION

For the foregoing reasons, *amici* request that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-460

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In the Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC. and
SANTA MONICA BAYKEEPER
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE NATIONWIDE PUBLIC PROJECTS COALITION, WEST VALLEY WATER DISTRICT OF CALIFORNIA, METROPOLITAN DENVER WATER AUTHORITY OF COLORADO, SEMITROPIC WATER STORAGE DISTRICT OF CALIFORNIA AND WHEELER RIDGE-MARICOPA WATER STORAGE DISTRICT OF CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici are cities, water and wastewater districts, and private entities providing essential services to the public. If upheld, the Ninth Circuit's decision would require virtually all entities that transfer water through a concrete channel or other engineered improvement to obtain Clean Water Act National Pollution Discharge Elimination System (NPDES) permits for every stage of the transfer. This requirement would have profound implications for the ability of *Amici's* members to provide public services in a timely and cost-efficient manner.

The Nationwide Public Projects Coalition (NPPC), headquartered in Colorado, is a not-for-profit association of regional and local government agencies involved in water supply, flood control, irrigation, and wastewater and stormwater management. These agencies represent some 15 million constituents, extending from Connecticut to California and from Alaska to Georgia. NPPC's mission is to represent the public interest in

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[1] The parties have consented to the filing of this brief. *Amici* have filed letters of consent with the Clerk. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

ensuring that vital public infrastructure services are provided in a safe, timely, affordable, and environmentally-responsible fashion. Consisting predominantly of public agencies and firms that provide services to the public sector, NPPC's members must ensure that a fair balance is achieved between environmental values and essential public needs.

The West Valley Water District of California (WVWD) is an independent special water district located 60 miles east of Los Angeles that serves approximately 65,000 citizens. WVWD routinely engages in interbasin transfers of water through various diversion structures to address fluctuations of available water from WVWD's sources.

The Metropolitan Denver Water Authority (MDWA) is a political subdivision and public corporation of the State of Colorado. MDWA is made up of 20 cities and special districts that provide municipal water and/or wastewater services for the Metropolitan Denver, Colorado area and serves more than 1.5 million persons. MDWA's member agencies are dependent on interbasin water transfers to meet the water needs of their constituents.

The Wheeler Ridge-Maricopa Water Storage District of California (WRMWSD) is a political subdivision of the state of California that encompasses 228 square miles of mostly

agricultural land. WRMWSD relies on interbasin transfers to supply the growing demand for water of landowners within its jurisdiction.

The Semitropic Water Storage Agency, located in the San Joaquin Valley, part of Kern County, California, supplies water to over 220,000 acres of which 140,000 acres are irrigated. The farmers within Semitropic have a total annual demand of approximately 450,000 acre-feet which is met by surface water import and local groundwater. Semitropic also has a fully permitted and partially completed 1,650,000 acre-foot groundwater storage facility serving urban and public agencies that benefit more than 20 million people from San Diego to the San Francisco Bay area.

The outcome of this case will have a profound impact on the collective interests of *Amici* and the public they serve. Interbasin water transfers through various engineered diversion structures are a necessity for countless water districts, especially in areas where the demand for water outpaces historic, localized supply. By requiring water districts to obtain NPDES permits for these routine and critical water transfers from one segment of the same body of water to another, the Ninth Circuit's decision would exponentially increase the costs of regulatory compliance and —

at the same time — reduce the flexibility water districts currently enjoy to obtain needed water from a variety of sources. The ultimate losers will be consumers, who will face dramatically higher water costs in return for marginal to non-existent environmental benefits. Indeed, requiring permits for such routine transfers runs counter to this Court's holding in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) (*Miccosukee*) that such transfers of water "cannot constitute an addition of pollutants" requiring an NPDES permit. This Court should reject the reasoning of the Ninth Circuit to prevent further intrusion into activities that traditionally have been, and should remain, outside the NPDES permit process of the Clean Water Act (CWA).[2]

SUMMARY OF ARGUMENT

1. The Ninth Circuit's interpretation of "addition of pollutants" misconstrues the statutory language of the Clean Water Act and conflicts with this Court's ruling in *Miccosukee*. The transfer of water through an engineered structure within a water management system does not result in a "discharge" from a regulated "point source." Extending CWA regulation to such conveyances

[2] Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (2002).

would require a permit for virtually every interbasin transfer of water. This would have a significant impact on a wide spectrum of *Amici's* water management activities that in no way "add" pollutants to the waters they transfer.

2. The Ninth Circuit incorrectly merged regulation of "point source" and "non-point source" pollution by requiring water management agencies to obtain NPDES permits in the circumstances presented here. In effect, the Ninth Circuit's ruling — that in-stream engineered structures become point sources simply by redirecting water through the in-stream structure — enlarges the regulatory scope of the NPDES permit program to cover non-"point source" pollution traditionally regulated by the States.

3. The Ninth Circuit's interpretation of the CWA is inconsistent with fundamental principles of federalism. Nothing in the CWA evinces a "clear statement" that Congress intended to encroach upon state and local regulation of land use and water management activities, a "quintessential" state and local power.

ARGUMENT

I. THE NINTH CIRCUIT MISINTERPRETED THE STATUTORY TERM "ADDITION OF POLLUTANTS" IN WAYS THAT COULD HAVE A SIGNIFICANT ADVERSE EFFECT ON A WIDE SPECTRUM OF VITAL WATER MANAGEMENT SERVICES.

A. The transfer of water through an engineered improvement within a managed water system does not result in a "discharge" because pollutants are not added to a navigable water from the outside world by a "point source."

The Ninth Circuit's ruling misconstrues the language of the CWA and would expand the regulatory scope of the permit process in ways that are flatly contrary to the statute. Although this particular case involves a municipal separate storm sewer system (MS4) permit (water flowing through concrete channels into the "naturally occurring" portions of the Los Angeles and San Gabriel Rivers), it has ramifications far beyond the MS4 permit at issue. At its essence, the Ninth Circuit decision represents a fundamental alteration of the CWA's regulatory scheme. In the Ninth Circuit's

incorrect view, a man-made structure within a stream transforms that part of the stream into a point source so that water flowing through the structure results in an "addition of pollutants" from a "point source."[3] That view is incompatible with the statute because, under the Ninth Circuit's interpretation, water management districts would need to obtain NPDES permits for transfers of water through engineered diversion structures even when the conveyance merely redirects water without adding any pollutants from the outside world. In so ruling, the Ninth Circuit ignored the central core of this Court's holding in *Miccosukee* that movement of water within a single water body "cannot constitute an addition of pollutants."[4] In *S.*

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[3] The term "discharge of a pollutant means (A) any addition of any pollutant to navigable waters from any 'point source." 33 U.S.C. §1362(12). The term "point source" means "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C §1362(14)

[4] *Miccosukee* cited the "unitary waters" argument advanced by the Government (that "all the water bodies that fall within the Act's definition of navigable waters should be viewed unitarily for the purposes of the NPDES permitting requirements"), 541 US 95, 105-106. Although the Court declined to resolve that issue, it still cited the Second Circuit's *Trout Unlimited* decision on "additions" ("[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into

D. Warren v. Maine Board of Environmental Protection, 547 U.S. 370, 380 (2006), the Court again recognized that "discharge" under §402 of the CWA has a very specific meaning requiring an "addition of a pollutant."[5] Indeed, EPA's regulations make clear that a "point source outfall" does not include "open conveyances connecting two municipal separate storm sewer or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United

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the pot, one has not 'added' soup or anything else to the pot." 541 U.S. at 110 (citing *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of N.Y.*, 273 F.3d. 481, 492 (2d Cir. 2001).

[5] In *S. D. Warren* the Court distinguished §402 from §401 of the CWA, the latter of which requires a State to furnish a water quality certification for "discharges." The Court noted that "Section 402 has a historical parallel with §401, for the legislative record suggests that it, too, was enacted to consolidate and ease the administration of some predecessor regulatory schemes ...." *See* H.R. Rep. No. 92-911, at 124-25 (1972), *as reprinted in* 1 Leg. Hist. 805-806. But it contrasts with §401 in its more specific focus. It establishes what Congress called the National Pollutant Discharge Elimination System, requiring a permit for the "discharge of any pollutant" into the navigable waters of the United States, 33 U.S.C. §1342(a). The triggering statutory term here is not the word "discharge" alone, but "discharge of a pollutant," a phrase made narrower by its specific definition requiring an "addition" of a pollutant to the water. §1362(12).

States." 40 C.F.R. §122.2 (2002). EPA's "water transfer" rule further clarified that water transfers are not regulated under the NPDES program unless there is an "intervening industrial, municipal or commercial use."[6] Thus, under the CWA there is no addition of a pollutant from a "point source" unless the "point source" actually introduces a pollutant from the outside world. Under the Ninth Circuit's reasoning, however, the mere transfer of water though a man-made structure without any such intervening use would require an NPDES permit. Contrary to the express statutory focus, the Ninth Circuit's incorrect interpretation essentially guarantees that public entities would be forced into the time-consuming and costly NPDES permit process for water transfers that do not "add" any pollutants.

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[6] EPA's water transfer rule, 73 Fed. Reg. 33661, 33701 (June 13, 2008), excluded water transfers from the permit requirements and noted that requiring NPDES permits for such transfers would upset the "balance Congress created between federal and state oversight of activities affecting the nation's waters" (citing various provisions of the Act such as §101(g): the CWA is not to be construed in a manner to "unduly interfere with the ability of States to allocate water within their boundaries . . ."). *Id.* at 33702. EPA's rule was upheld by the Eleventh Circuit in *Friends of the Everglades Inc. v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 643 (2010).

The broad reach of the Ninth's Circuit's flawed interpretation of the CWA becomes apparent when one considers the composition of typical water segments. Because no two water segments are identical — even within a unitary hydrologic system — the Ninth Circuit's rationale will inevitably (and incorrectly) result in finding the "addition of pollutants" in totally inappropriate circumstances given the CWA's broad definition of "pollutants." Brian J. Skinner & Stephen C. Porter, *Physical Geology* 283-85, 299-300 (1987). That is because each segment of a naturally occurring water contains a hodgepodge of materials in varying proportions. *Id.* Even within a unitary water storage basin, different water segments possess varying chemical compositions, consisting of different types and ratios of organic and inorganic nutrients deposited by sources such as runoff, erosion, non-point source pollution, adjacent land use and exempted or previously-permitted discharges. *See id.* at 291-98; Raymond A. Young & Ronald L. Giese, *Introduction to Forest Science*, 397-401 (2d ed. 1990). Each segment is influenced by its own diverse topography, distinct tributaries, and heterogeneous substrate. Skinner & Porter, *supra*, at 292. These factors produce varying flow rates that cause different segments to exhibit disparate temperatures, to produce distinct dissolved oxygen levels, and to possess a different capacity for carrying suspended solids. *Id.* at 272-

79, 283-86; Young & Giese, *supra*, at 396-401. Finally, the different location of each segment yields different types and amounts of biological material such as vegetative matter and animal remains.

Under the Ninth Circuit's reasoning, the simple act of moving water by an engineered diversion would be enough to require an NPDES permit. Indeed, an "addition of pollutants" subject to regulation would occur whenever any intra-system diversion structure transfers water within a water basin (a routine practice for water supply systems) even though no pollutants from the outside world are added. Naturally occurring water constituents would be transmogrified into regulable pollutants simply by flowing from one component of the same water management system to another. Such far-reaching implications should weigh heavily in favor of reversing the decision below.

B. The Ninth Circuit's incorrect holding makes it very difficult for water supply facilities to meet the public's critical water supply needs efficiently and effectively.

The impact of the Ninth Circuit decision is especially significant in light of the wide spectrum

of water management and supply systems nationwide. These systems contain literally millions of water diversion structures that fit within the Ninth Circuit's incorrect definition of "point sources" and, under the decision below, would be subject to the NPDES permitting process for the first time. Among the water management and supply projects that would be regulated under the Ninth Circuit's rationale are: facilities that ensure public safety, such as dams and flood control systems; facilities that serve agriculture, such as irrigation supply systems; water supply facilities that provide an adequate amount of safe drinking water; and ecosystem and species preservation programs, such as those that regulate water flow from lakes and reservoirs into rivers and streams. *See* Skinner & Porter, *supra,* at 283 (discussing the wide variety of indispensable uses for water management and supply infrastructure). *Amici* are aware of countless examples of diversion structures that, while technically qualifying as "point sources" under the CWA, operate without adding to the water any pollutants from the outside world. Yet, under the Ninth Circuit's ruling all such structures will be forced into the NPDES permitting process.

Water management and supply facilities along the Colorado River provide but one example of the countless projects that the Ninth Circuit's

interpretation will subject to the time-consuming and expensive NPDES permitting process. The Colorado River contains water management and supply infrastructure constructed between 1938 and 1964. *Id.* at 282. This infrastructure includes a system of dams, reservoirs, canals and 400 kilometers of aqueducts that perform a variety of critical functions throughout the Southwest. *Id.* at 282-83. The Parker Dam provides most of the municipal water supply for Los Angeles and San Diego. *Id.* at 283. The Imperial Dam furnishes irrigation water to farms throughout the Southwest. *Id.* Three other dams along the river generate hydroelectric power that is the primary source of electricity for customers throughout the region. *See id.* Within this water management system, numerous diversions and conveyance structures move water from the dams/reservoirs into other waters of the United States.

The particular plight of other NPPC members further illustrates the scope of projects that the Ninth Circuit opinion would pull into the NPDES permit process.

The California State Water Project (SWP), an intricate water transfer and delivery system, supplies water to two-thirds of California's citizens. SWP's supply of more than four million acre-feet of water per year is largely drawn from the Feather

River watershed in Northern California and transported south via the Sacramento-San Joaquin River Delta, where the SWP water is commingled with water from the watersheds of the Sacramento, American, Stanislaus, Mokelumne, San Joaquin, and many other rivers. These diverse bodies of water each have different chemical compositions, including vastly different levels of phosphates, suspended solids, and other federally-recognized pollutants. As it moves south, SWP water is diverted to water districts throughout California, where it is often mixed again with local water supplies, each with its own unique chemical composition.

Under the Ninth Circuit's decision, the transport and distribution of SWP water would become bogged down in a costly and time-consuming regulatory morass that Congress did not intend. Merely counting the number of times SWP water combines with water from another distinct source through a structure such as a concrete spillway would be a challenge. The prospect of obtaining a separate NPDES permit for each combination is a regulatory nightmare that would dramatically increase compliance costs and could force the State to rethink its entire water distribution system.

For example, the Wheeler Ridge-Maricopa Water Storage District of Kern County, California, which obtains most of its water supply via the California Aqueduct directly from the SWP, provides water to 72,074 acres of farm lands within the District's Surface Water Service Area. While most of the District's water supply comes from SWP interbasin transfers, the District has also been forced to secure additional dry year water supplies from the Kern Water Bank, Pioneer Project and Berrenda Mesa Project. These projects utilize flood flows and excess water supplies from the Kern River, the Central Valley Project (which is an interbasin from the San Joaquin River watershed into Kern County) and the SWP. The District is very concerned over the delays, cost increases and restrictions that could arise from NPDES permitting in both wet and dry years — all without any environmental benefit.

Other California water agencies would face similar burdens. NPPC member the West Valley Water District in Rialto obtains its surface water from a small water body known as Lytle Creek, which is designated a cold water stream by the Regional Water Quality Control Board. The creek water is normally diverted and used for the operations of electricity before it is distributed to water agencies through diversion. The District blends creek water with SWP water provided by a

State Water Contractor who wholesales water to local agencies. At times, the District must divert water back into the creek. If NPDES permits were required for these diversions, the District estimates that it would have to add other types of treatment prior to discharge back into the creek or for groundwater storage and recovery at substantial additional expense — again, without any environmental benefit. Similarly, NPPC member Semitropic Water Storage District moved over one million acre-feet in and out of storage since the inception of its program in the mid 90s. If NPDES permits were required, it would hamper the District's ability to move water to and from storage through transfers and exchanges critical to ensure this important program works efficiently to supply water in drought years to more than twenty million people.

The impact of the Ninth Circuit's decision would also be significant to the Metropolitan Denver Water Authority (MDWA), one of the fastest growing areas in the nation. MDWA, which serves suburbs within the Metropolitan Denver area, is supported by annual membership assessments based on the number of water and/or sewer taps provided. Most member communities obtain their raw or treated water from the City of Denver. The City shares with its suburban neighbors water that it gets from watersheds

including the South Platte, east of the Continental Divide, and the Colorado River, west of the Continental Divide. The additional costs of NPDES permits that Denver would have to obtain for inter-basin transfers would be passed on to MDWA's members who would receive no environmental benefit.

C. The Ninth Circuit's massive expansion of the NPDES permit process would be costly and time-consuming without producing any environmental benefits.

The economic and temporal burdens of acquiring a permit[7] and complying with its terms would impose severe burdens on NPPC members currently grappling with serious financial constraints. In turn, since 46 states have assumed responsibility for the NPDES permit program, the new requirements created by the Ninth Circuit will

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[7] NPDES permit applications require parties to develop a complex database to address issues such as water quality-based effluent limitations, monitoring and reporting of existing water quality conditions, best management practices, compliance schedules and various other procedures. *See* 40 C.F.R. §122.21 (2002). This process also involves notice to the public with an opportunity for the public to challenge proposed permits at the administrative level — an undertaking that can render the NPDES permitting process interminable. *See* 40 C.F.R. §§124.10-14 (2002).

also fall heavily on financially-strapped state agencies. *See* Dep't of Interior, Office of the Inspector General, *EPA State Enforcement of Clean Water Act Discharges Can Be More Effective*, 8 (2001).

An EPA study on the burdens of simply acquiring a NPDES permit sheds some light on the costs applicants and states will incur.[8] EPA estimates that the total annual temporal NPDES MS4 burden is 223,040 hours.[9] The EPA study also estimates that the total MS4 permitting cost is $26,987,958.[10] Should this Court uphold the Ninth Circuit, these costs will increase dramatically. Thus, EPA estimates of the prior costs and commitment of resources represent only a fraction of the new burdens that the decision below could, for the first time, thrust upon countless water management and supply facilities.

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[8] *See* EPA Information Collection Request For Applications For National Pollutant Discharge Elimination System Discharge Permits and the Sewer Sludge Management Permits (Final Draft), OMB No. 2040-0004 EPA ICR No. 0229.1 (2005), available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2004-0031-0004.

[9] *Id.* Table B-1, pg. B-2.

[10] *Id.*

Much of the inevitable financial burden of the many new NPDES permits that the Ninth Circuit requires will ultimately fall on the shoulders of American taxpayers. Parties that cannot bear the costs or meet the standards under NPDES *(e.g.,* effluent limitations, monitoring requirements) would be forced to alter or abandon their operations — possibly jeopardizing the supply of adequate drinking water in large cities, interrupting the flow of water to irrigation-dependent farms, disrupting the operation of flood control facilities that pump out encroaching water from populated areas, and encumbering efforts to protect threatened and endangered species and to preserve critical habitat. Unless the decision below is reversed, the American public could be forced to accept the major public safety risks associated with the possible disruption of flood control operations, the potential risk of an inadequate drinking water supply, and the seasonal impacts of the hydrologic cycle on irrigation-dependent agriculture.

II. THE DECISION BELOW INCORRECTLY MERGES TWO COMPLEMENTARY, BUT DISTINCT, MANDATES OF THE CWA.

By requiring water management agencies such as SFWMD to address the pre-existing "pollutants" found in the waters they seek to divert, the Ninth Circuit improperly merges two

complementary, but distinct, mandates under the CWA. In effect, the Ninth Circuit ruling — that an in-stream engineered structure becomes a "point source" when transferring water — enlarges the regulatory scope of the NPDES permit program to require water management agencies to address "non-point sources" of pollution, which are traditionally regulated by states and localities under different CWA standards and requirements.

The NPDES permit program is not intended to address all potential sources of pollution in our nation's waters. Indeed, NPDES applies only to facilities that discharge pollutants from "point sources." *See* 33 U.S.C. §1342. Other provisions of the CWA address non-point sources of pollutants. "Non-point source" pollution comes from a wide variety of human activities in the watershed as water runs off or moves through the ground, such as "runoff from farmlands, mining activity, housing construction projects, roads, and so on." *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). "Non-point sources" generally "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Id.* at 1025. In fact, the CWA established financial incentives for states to implement management

programs to address "non-point source" pollution outside the NPDES permitting program.[11]

Addressing non-point source pollution is considerably more complex than "end of the pipe" NPDES permitting. Pursuant to CWA §303(c), states must establish water quality standards and submit those standards to the EPA for review. *See* 33 U.S.C. §1313(a)-(c). To determine water quality standards, the state designates a use for a particular body of water and then determines the level of water quality required to achieve that use. *See id.* §1313(c)(2)(A). Where effluent limits are not stringent enough to implement water quality standards, States and EPA have authority to develop Total Daily Maximum Limits (TMDLs) for such waters needed to meet standards that consist of Waste Load Allocations (WLAs) from "point sources" and Load Allocations (LAs) for "non-point sources."

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[11] Section 208 of the CWA creates an area-wide planning program for state and local planning agencies to control non-point sources through water quality management programs with federal grants available to assist, 33 U.S.C. §1288(a). Congress added §319 to the Act in 1987 requiring states to develop phased nonpoint-source management programs with federal funding, 33 U.S.C. §1239 (a). *See generally* Mark A. Ryan, *The Clean Water Act Handbook*, 193-97 (Am. Bar Ass'n 3d ed. 2011).

In contrast to the regulatory regime Congress enacted, the Ninth Circuit's decision would force water districts to control diffuse "non-point source" constituents through the NPDES program. In effect, water districts could become liable for violations of an NPDES permit for exceedences of water quality standards in the stream caused by "non-point source" runoff intended to be covered under state and local programs. Thus, by requiring an NPDES permit for engineered water movements within an MS4 system that contains many constituents from storm water runoff, the Ninth Circuit ignores the division between "point" and "non-point sources" of pollution and fails to consider the ramifications this merger will have by forcing parties such as *Amici's* members to address "non-point source" pollutants as a matter of federal regulatory law. Under the Ninth Circuit's ruling, a party that transfers water within the same unitary body of water becomes responsible for its physical characteristics by doing nothing more than redirecting such water internally from one segment to another.[12] Water

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[12] Parties that obtain individual NPDES permits must meet certain effluent limitations, which are limits on the amount of pollutants that may be discharged. *See* 33 U.S.C. §1311. Hence, the NPDES permit could be used to require the water management authority to remediate existing pollutants which are ever-changing, depending on up-stream conditions. Indeed, such districts could face civil penalties of up to

management facilities will be forced to obtain NPDES permits and to retrofit their facilities to address pre-existing (and changing) water quality conditions despite having added nothing to the water.

III. THE DECISION BELOW VIOLATES A FUNDAMENTAL PRINCIPLE OF FEDERALISM. ABSENT A "CLEAR STATEMENT" FROM CONGRESS, A REVIEWING COURT SHOULD NOT INTRUDE INTO STATE AND LOCAL CONTROL OF LAND AND WATER RESOURCES.

In holding that the concrete channel in the LA River is a "point source," the Ninth Circuit adopted an unprecedented broad interpretation of the statutory term "addition of a pollutant" that disrupts the existing delicate balance between federal and state regulation of land and water resources. There is no "clear statement from Congress" that it intended such a result. Rather, Congress expressly preserved the States'

$37,000 per day for each day of violation, 33 U.S.C. §1319(d), and up to an additional $37,500 for violating an EPA CWA administrative enforcement order under §309(a) of the Act. 33 U.S.C. §1319(a). *See Sackett v. EPA*, 132 S. Ct. 1367 (2012). They also become targets for citizen suits under §505 of the Act, including liability for attorneys fees. 33 U.S.C. §1365(d).

traditional and primary power over land and water use when setting out the scope of activities regulated under the CWA.

A. Nothing In the CWA evinces a clear statement that Congress intended to encroach upon local regulation of water management and supply activities that do not add pollutants

A principal tenet of federalism is that courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended to alter the traditional balance between federal and state powers. In cases where a court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *See Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001); *Rapanos v. United States*, 547 U.S. 715, 724 (2006).[13] This Court has recognized that there is an underlying assumption

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[13] As Justice Scalia noted in *Rapanos*, "Regulation of land use, as through the issuance of the development permits sought by petitioners . . . is a quintessential state and local power . . . . We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority.' *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)." 547 U.S. at 738 (citation omitted) (Scalia, J., plurality op.).

that the power to legislate in areas traditionally regulated by the States "is an extraordinary power . . . [that] Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to intrude into state interests. *See Gregory*, 501 U.S. at 464.

The Ninth Circuit's decision clearly upsets the CWA's "cooperative federalism." Section 101 of the CWA specifically limits federal authority over state and local matters:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.

33 U.S.C. §1251(b). Congress also explicitly stated that nothing in the CWA is to "be construed as impairing or in any manner affecting any right or

jurisdiction of the States with respect to the waters . . . of such States." *Id.* §1370(2).[14]

The division between the regulation of point and non-point source pollutants reflects this dual approach. "In so doing, the CWA uses distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) (citation omitted). While NPDES is based on "technological controls to limit the pollution point sources may discharge," the CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task," consistent with CWA §101. *Id.* at 1126-27 (citations omitted).

The plain language of the CWA provides no "clear statement" that Congress intended to regulate all intra-system water movements that somehow affect water quality. Accordingly, there is no basis for concluding that it is "unmistakably clear" Congress intended the statutory term "addition of pollutants" to encompass everyday activities such as water management or other routine water supply projects. Congress set forth the very specific limit that regulated activities

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[14] *See also* 33 U.S.C. §1288 (encouraging states to develop area-wide management plans).

must result in an "addition" of pollutants in order to fall within the ambit of NPDES control. This careful balance between state and federal power should not be upset.

B. States have enacted water quality programs that are far broader and more comprehensive than the NPDES program.

Amici recognize the salutary objective of the CWA to protect the Nation's waters. But §402 does not cover all water movement activities that could potentially impact water quality. Consistent with the statutory language and with fundamental principles of federalism, activities such as water management, irrigation and drinking water supply, flood control and other routine water transfer uses are properly within the purview of state and local governments. Consistent with the statutory language, this Court has recognized that the CWA "establishes a distinctive variety of cooperative federalism which authorizes a State to 'administer' its own permit system that complies with federal statutory and regulatory requirements." *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 633 (1992); *see also Pronsolino*, 291 F.3d at 1140. As discussed above, the CWA bestows "primary" responsibility on the states to protect water resources. Pursuant to that

statutory authority, states and literally thousands of local governments regulate navigable waters.[15]

State-based clean water laws are typically far broader than their federal counterpart — regulating a wider spectrum of water management and supply projects. For example, California's Porter-Cologne Act requires any discharger or potential discharger that "could affect the quality of the waters of the state . . ." to report the activity to a regional clean water control board. *See* Cal. Water Code §13260(a)(1). The board then issues permit-like waste discharge requirements that account for water quality objectives, other waste discharges, the necessity of preventing discharge-related nuisances, and the beneficial uses the board seeks to protect. *See id.* §13263. As its primary operative mechanisms, the California statute prohibits any discharge of waste before a potential discharger files a report with the regional board; the statute also provides abatement authority to remedy unapproved discharges. *See id.* §§13264, 13304(a).

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[15] *See* Wetland Protection Policy, 1993: Hearings on S. 1304 Before the Subcommittee On Clean Water, Fisheries and Wildlife of the Senate Committee on Environment and Public Works, 103d Cong. (1993) (statement of Nat'l Ass'n of State Dep'ts of Agric.), available in LEXIS, Legis Library, Cngtst File.

In Colorado, the Water Quality Control Act establishes a state water quality control commission. Colo. Rev. Stat. §25-8-101 *et seq.* The commission has the duty to set state water quality standards and may promulgate "precautionary measures, both mandatory and prohibitory, that must be taken by any facility, process, activity or waste pile that does cause or could reasonably be expected to cause pollution of any state waters in violation of control regulations or . . . any applicable water quality standard . . . ." *See id.* §§25-8-204, 25-8-205(l)(c). Similarly, Georgia's water pollution control law assigns to the state's Environmental Protection Division the responsibility "to regulate the withdrawal, diversion, or impoundment of the surface waters of the state . . . ." Ga. Code Ann. §12-5-21(b). The law also establishes a state board with the authority to promulgate water quality standards and associated rules to address any water quality need on a state, regional, or local level. *See id.* §12-5-23(a)(l).

Additional examples of state-based water pollution control laws that exceed CWA requirements are plentiful. Florida's water pollution control law broadly defines "waste" to include "substances which may pollute or tend to pollute any waters of the state" and forbids any unauthorized discharge into state waters of "any waste which, by itself or in combination with the

wastes or other sources, reduces the quality of the receiving waters below the classification established for them." *See* Fla. Stat. ch. 403.031(12), 403.088(1). Pennsylvania's Clear Streams Act takes an equally broad approach, prohibiting any person or municipality from discharging "any substance of any kind or character resulting in pollution . . . ." *See* 3 Pa. Cons. Stat. §691.401. Notably, the Pennsylvania statute defines "pollution" to encompass "contamination of any waters . . . including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid, or other substances into such waters." *Id.*

In a similar vein, all fifty states, the District of Columbia, and the Commonwealth of Puerto Rico, have enacted laws that apply to non-point source discharges. *See* Environmental Law Institute, *Almanac of Enforceable State Laws to Control Nonpoint Source Water Pollution,* 1 (1998). The states fill a critical role in the overall scheme of the CWA (*id.*):

> Nonpoint source discharges, which consist generally of polluted runoff from farms, forests, land development and other activities, are not regulated under

> the federal Clean Water Act's National Pollutant Discharge Elimination System permitting program. Instead they are addressed primarily through nonregulatory means, such as planning, incentive and cost-share mechanisms . . . . Yet, increasingly, states are finding it necessary to deal with nonpoint source discharges that cannot be prevented, controlled, or abated adequately by these means.

Well aware of the comprehensive state-based initiatives discussed above, the EPA has explained the essential role of federalism in the protection of water resources even as to the permitting of point source discharges:

> More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the [Clean Water Act permitting] program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with the local resources,

> issues, and needs than are Federal regulators.[16]

Thus, there are many state and local protections in place to facilitate more creative and, therefore, less burdensome regulatory schemes than the CWA NPDES program[17] Such initiatives are directly threatened by the Ninth Circuit's expansive interpretation of the statutory term "addition of pollutants."

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[16] EPA, Office of Wetlands, Oceans, and Watersheds, *State or Tribal Assumption of the Section 404 Permit Program* (May 25, 1999), *available at* http://www.epa.gov/owow/wetlands/facts/fact23.html.

[17] For example, unlike the CWA, certain states protect both surface and groundwater. *See, e.g.*, Cal. Water Code §13050(e); 415 111. Comp. Stat. 5/3.550.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-460

In The

Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES
DEFENSE COUNCIL, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF DR. LINWOOD PENDLETON REGARDING ECONOMIC IMPACTS OF STORM WATER RUNOFF IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS

The amicus, Linwood Pendleton has studied and published on the economics of water quality and beach going for more than a decade.[1] Dr. Pendleton holds a Doctorate of Forestry and Environmental Science from Yale University, a Master of Public Administration from Harvard University, a Master of Art in Ecology, Evolution, and Behavior from Princeton University, and a Bachelor of Science in Biology from the College of William and Mary in Virginia.

He was formerly a tenured professor at the University of California Los Angeles. Currently, Dr. Pendleton is the Director of Ocean and Coastal Policy at Duke University's Nicholas Institute for Environmental Policy Solutions. Dr. Pendleton has not been employed by or been a consultant to the parties to this litigation on issues related to this case, although Dr. Pendleton did testify in the proceedings leading to the issuance of the Petitioner's NPDES permit that is the subject of this case. Dr. Pendleton is filing this brief solely as an individual and not on behalf of any institution.

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[1] All parties have consented to the filing of this brief, and the consent letters are on file with the Clerk in accordance with Supreme Court Rule 37.2(a). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, associated institutions, or his counsel made a monetary contribution to its preparation or submission.

Dr. Pendleton submits this brief to provide insights on the economic literature concerning economic impacts of polluted storm water. An economist's perspective may be helpful to the Court as it considers the impact of pollutants discharged to waters subject to the Clean Water Act.

SUMMARY OF ARGUMENT

Storm water runoff alters the chemical, physical, and biological integrity of surface waters. It alters hydrology, accelerates stream flow, adversely affects aquatic habitat, and conveys pollutants to adjacent waters. The Clean Water Act requires "owners and operators" of municipal separate storm sewer systems (MS4) to apply for and receive a National Pollutant Discharge Elimination System (NPDES) permit. The purpose of the permit is to reduce the adverse impacts from storm water.

The pollutants in storm water runoff can adversely affect public health by conveying large volumes of human pathogens into waters in which people recreate. Human pathogens cause disease or illness in people. Common human pathogens include bacteria that cause illnesses such as gastroenteritis, skin rashes, and eye, ear, and respiratory infections. The public health impacts from bacterial contamination have a substantial economic impact on individuals and communities. In Los Angeles and Orange Counties, between 579,000 and 1,224,000

cases of gastroenteritis were estimated to have been caused by bacterial contamination in beach water. A 2000 study estimated the cost of these illnesses to be between $14.2 and $35.1 million in Los Angeles County alone. Nationwide, illnesses caused by contact with water contaminated by human pathogens cost over $300 million annually. Improving water quality increases beach attendance and creates an economic benefit.

Declining water quality in general has a negative economic impact – estimated to be $20 billion across the nation from 1994 to 2000. Polluted storm water also affects housing values across the nation.

Polluted storm water has a significant economic effect.

ARGUMENT

I. POLLUTED STORM WATER HAS A SIGNIFICANT NEGATIVE ECONOMIC IMPACT.

A. The Clean Water Act requires NPDES permit holders to reduce pollutant loading from MS4s.

The Clean Water Act requires a permit for discharges of a pollutant from a point source to waters of the U.S. 33 U.S.C. §§ 1311(a), 1362(12). Petitioner operates a municipal separate storm sewer system (MS4) for which it applied and received a National Pollutant Discharge Elimination System (NPDES)

permit. NPDES permits restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents" discharged through an MS4. 33 U.S.C. §§ 1311(e), 1362(11). MS4s are conveyance systems for storm water, which has been identified as a leading cause of impaired waters in the United States. 64 Fed. Reg. 68,722, 68,726 (Dec. 8, 1999). *See also* E.P.A. 841-F-03-003, Protecting Urban Water Quality From Urban Runoff (Feb. 2003); National Water Quality Inventory: Report to Congress, 2004 Reporting cycle, 9-22 (available at http://water.epa.gov/lawsregs/guidance/cwa/305b/2004report_index.cf). The purpose of the NPDES permit for MS4s is to reduce polluted storm water discharged into waters of the U.S.

Both storm water volume and the pollutants conveyed by storm water adversely affect the chemical, physical, and biological integrity of surface waters. Storm water can adversely affect surface water hydrology, accelerate stream flows, adversely affect aquatic habitat and increase pollutant loadings. *See* 64 Fed. Reg. 68,722, 68,724 (Dec. 8, 1999). Polluted storm water can contain a variety of pollutants of concern, including human pathogens like pathogenic strains of the bacterium Escherichia coli (E. coli). Human pathogens are agents, including bacteria, which cause disease or illness in humans. Fecal indicator bacteria (e.g., fecal coliform) are useful indicators of water quality because these bacteria live in the intestinal tracts of warm-blooded animals, including humans. The presence of fecal indicator bacteria

indicates the likely presence of human pathogens like E. coli. Storm water polluted with human pathogens can adversely affect public health and the environment, thereby imposing direct and indirect costs on communities. In addition, storm water contaminated with bacteria, heavy metals, or other pollutants, has a substantial economic impact generally and on important economic values like housing prices.

B. Storm water polluted with human pathogens results in public health effects that have negative economic impacts on surrounding communities.

MS4s convey polluted storm water, including bacterial pollution, to adjacent waters. 64 Fed. Reg. at 68,725. It is important to note fecal indicator bacteria can be conveyed to surface water through mechanisms other than storm water runoff. For example, leaking sewage infrastructure and septic systems also contribute to poor water quality associated with bacterial contamination. Polluted storm water, however, is a significant source of bacterial contamination, the scope and scale of which varies based on any number of factors. Storm water contaminated with human pathogens results in documented public health impacts that have significant economic costs. For coastal communities, bacterial contamination constitutes a substantial economic impact because it adversely affects public health and causes

a loss of beach visitation and overall value to beachgoers.[2]

Coastal water contaminated by human pathogens poses a significant public health risk, causing such illnesses as gastroenteritis, skin rashes, and eye, ear, and respiratory infections.[3] Although beach

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[2] Robert W. Haile, et al., *The Health Effects of Swimming in Ocean Water Contaminated by Storm Drain Runoff*, 10 Epidemiology 355, 355-363 (1999) (storm water contributes to illness); Ryan H. Dwight, et al., *Estimating the Economic Burden from Illnesses Associated with Recreational Coastal Water Pollution – A Case Study in Orange County, California*, 76 J. Envtl. Mgmt. 95 (2005) (illness causes economic impact); Suzan Given, et al., *Regional Public Health Cost Estimates of Contaminated Coastal Waters: A Case Study of Gastroenteritis at Southern California Beaches*, 40 Envtl. Sci. Tech. 4851, 4851-4858 (2006).

[3] World Health Organization, Guidelines for Safe Recreational Water Environments (2003); Annette Pruss, *Review of Epidemiological Studies on Health Effects from Exposure to Recreational Water*, 27 Int. J. Epidemiology 1, 1-9 (1998); David Kay, et al., *Predicting Likelihood of Gastroenteritis from Sea Bathing: Results from Randomized Exposure*, 344 Lancet 904, 904-909 (1994); Victor J. Cabelli, et al., *Swimming Associated Gastroenteritis and Water Quality*, 115 Am. J. Epidemiology 606, 606-616 (1982); L. M. Alexander, et al., *Symptomatology of Children in Contact with Seawater Contaminated with Sewage*, 46 J. Epidemiological and Community Health 340, 340-344 (1992); Wing Sum Cheung, et al., *Health Effects of Beach Water Pollution in Hong Kong*, 105 J. Epidemiology and Infection 139, 139-162 (1990); Graham B. McBride, et al., *Health Effects of Marine Bathing in New Zealand*, 8 Int. J. Environ. Health Resources 173, 173-189 (1998); M.D. Prieto, et al., *Recreation in Coastal Waters: Health Risks Associated with Bathing in Sea Water*, 55 J. Epidemiology and Community Health 442, 442-447 (2001); Arie Havelaar, et al., *Guidelines: the Current Position in* Water

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closure policies attempt to keep beachgoers away from severely contaminated water, there are many days each year where fecal indicator bacteria levels are still high enough to cause illness, even though these levels are not high enough to trigger mandatory beach closures.[4]

Storm water has a measurable and strong impact on southern California water quality as measured by high concentrations of fecal indicator bacteria in the storm water runoff.[5] In Los Angeles and Orange counties, coastal waters contaminated with human pathogens cause gastroenteritis, stomach pain, and diarrhea, resulting in significant economic costs for those two counties.[6] Using two competing epidemiological models, a 2006 study estimated that beachgoers visiting Los Angeles and Orange County public beaches accounted for between 627,800 and 1,479,200 cases of gastroenteritis alone.[7] In the dry season (May

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Quality: Guidelines, Standards and Health (L. Fewtrell and J. Bartram eds. 2001); Haile, *supra* note 2.

[4] Given, et al., *supra* note 2; Linwood Pendleton, *The Economics of Using Ocean Observing Systems to Improve Beach Closure Policy*, 36 Coastal Mgmt. J. 165, 165-178 (2008).

[5] Liesl Tiefenthaler, et al., *Levels and Patterns of Fecal Indicator Bacteria in Stormwater Runoff from Homogenous Land Use Sites and Urban Watersheds*, 9 J. Water and Health 279 (2011); Rachel Noble, et al., *Storm Effects on Regional Beach Water Quality Along the Southern California Shoreline*, 1 J. Water Health 23 (2003) (finding that storms increase fecal bacteria loadings in areas adjacent to urban runoff outlets).

[6] Given, et al., *supra* note 2

[7] Given, et al., *supra* note 2.

through October) the study estimated that between 579,000 and 1,224,000 cases of gastroenteritis were caused by water contamination at Los Angeles County and Orange County beaches.

When bathers become ill with gastroenteritis, it may result in direct financial costs to them and to society. For instance, bathers may miss work if they get sick or their children become ill from exposure to contaminated water. Bathers may also visit their physician or an emergency room and they may have to buy medicine to treat their illness. In 2005, economists surveyed beachgoers who reported getting ill and found that those who reported suffering from gastroenteritis on average incurred economic costs of $33.35 in lost wages, doctor's fees, and related expenses.[8] Using this figure, the study estimated that gastroenteritis caused by waterborne bacteria and viruses in the beach waters of Los Angeles and Orange Counties cost beachgoers between $21 and $51 million in 2000 (depending on the epidemiological model used to estimate the incidence of gastroenteritis).[9] In Los Angeles County alone, these illnesses may have resulted in between $14.2 and $35.1 million during 2000 with a cost of between $13.1 million or $28.8 million occurring in the dry season alone. For Orange County, another study used data on illnesses, medical costs, and mean annual salaries of Orange County

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[8] Dwight, et al., *supra* note 2.

[9] Given, et al., *supra* note 2.

residents to assess the economic impacts of exposure to polluted recreational marine waters contaminated by fecal bacteria.[10] The study estimated that the economic burden per person for various illnesses amounts to $36.58 for each gastrointestinal illness, $76.76 for each acute respiratory disease, $37.86 per ear ailment, and $27.31 per eye ailment. Further, it is estimated that exposure to polluted water at two Orange County beaches, Newport and Huntington, results in an average of 36,778 gastroenteritis cases per year, and an expected 38,000 cases of other illness types. This results in an estimated public health burden of $3.3 million per year for these two Orange County beaches alone.[11]

Extending this analysis to the nation as a whole by using swim advisories collected by the Environmental Protection Agency, economists found that each year over 5 million cases of gastroenteritis may be caused by swimming at contaminated beaches in the United States with a health care cost of over $300 million annually.[12]

Furthermore, water quality improvements increase beach attendance and the corresponding

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[10] Dwight, et al., *supra* note 2.

[11] Dwight, et al., *supra* note 2.

[12] Erin P. Ralston, et al., *An Estimate of the Cost of Acute Health Effects from Food- and Water-Borne Marine Pathogens and Toxins in the USA*, 9 J. Water and Health 680, 680-694 (2011).

economic benefit to individuals and communities, while contamination by bacteria decreases attendance and value of the beach. One method for estimating the effect of water quality contamination on beachgoer choices is to conduct a statistical analysis of how water quality and other factors determine which beaches beachgoers choose over the course of a year and how they trade off travel costs with better water quality. Researchers employed this method in Southern California and found that the number of beach visits decline when human pathogens and bacteria contaminate beach water.[13] These same researchers also found that beachgoers would have been willing to pay (if they had to) in order to prevent such contamination – a standard economic measure for economic harm. For example, if beach water quality at Zuma Beach in Los Angeles County declined to levels that would receive an F rating (on the Heal the Bay beach report card scale), it would have a negative economic impact of over $5 million on the economic wellbeing of beachgoers.[14] Furthermore, beachgoers elsewhere have been shown to be willing

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[13] Michael Hanemann, et al., Welfare Estimates for Five Scenarios of Water Quality Change in Southern California (2005). A report prepared for NOAA's Southern California Beach Valuation Project (http://coastalsocioeconomics.noaa.gov/core/scbeach/welfare_estimates.pdf).

[14] *See id.*

to pay $28 just to have one fewer beach water contamination advisory annually.[15]

Coastal contamination by human pathogens has a significant adverse public health impact that has been estimated to be a significant cost to the beachgoer and to the adjacent communities.

C. Polluted storm water has a significant negative economic impact beyond coastal contamination.

Storm water conveys many types of pollutants to surface waters, including bacteria and heavy metals, and it adversely affects the chemical and physical integrity of surface water by, for example, lowering dissolved oxygen, altering pH, and increasing total suspended solids in those receiving waters. The decline in water quality from polluted storm water has a substantial economic impact. Economists looking generally at the U.S. Environmental Protection Agency's water quality ratings found a direct correlation

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[15] Chris Murray, et al., *Valuing Water Quality Advisories and Beach Amenities in the Great Lakes*, 37 Water Resources Res. 2583 (2001); Janne E. Vesterinen, et al., *Impacts of Changes in Water Quality on Recreation Behaviour and Benefits in Finland*, 91 J. Envtl. Mgmt. 984, 984-994 (2010); Hakan Eggert and Bjorn Olsson, *Valuing Multi-Attribute Marine Water Quality*, 33 Marine Pol'y 210, 210-216 (2009); and Nick Hanley, et al., *Valuing the Benefits of Coastal Water Quality Improvements Using Contingent and Real Behavior*, 24 Envtl. and Resource Econ. 273, 273-285 (2003). These studies find similar results for beachgoers in Europe.

between declining water quality and economic impact. The 2008 study found that water quality degradation in inland waters of the U.S. resulted in a loss of economic value of $20 billion from 1994 to 2000.[16]

The economic effects of polluted storm water on housing values have also been studied. A 2000 study, for example, found that higher levels of fecal coliform significantly depressed property values of waterfront homes. The study further found a change in fecal coliform bacteria count of 100 units/100 ml led to a change in average home value of between $5,000 and $10,000 for homes near the Chesapeake Bay in Anne Arundel County, Maryland.[17] A similar study found in 2004 that improvements in water clarity as a result of upstream storm water management could add 3-15% to the value of adjacent land.[18] These studies exemplify the varied economic consequences from polluted storm water and the types of economic benefits that may accrue from implementing storm water controls.

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[16] W. Kip Viscusi, et al., *The Economic Value of Water Quality* 41 Envtl. Resource Econ. 169 (2008).

[17] Christopher G. Leggett and Nancy E. Bockstael, *Evidence of the Effects of Water Quality on Residential Land Prices*, 39 J. Envtl. Econ. Mgmt. 121 (2000).

[18] John B. Braden and Douglas M. Johnson, *Downstream Economic Benefits from Stormwater Management*, 130 J. Water Resources Plan. Mgmt. 498 (2004)

CONCLUSION

Polluted storm water is harmful to public health and imposes significant costs on a variety of sectors. The amicus believes that substantial economic costs may result from current pollutant loads, while reductions would decrease threats to public health and reduce negative economic impact.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and SANTA MONICA BAYKEEPER,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE LAW PROFESSORS ON THE "ADDITION OF A POLLUTANT" QUESTION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici are professors of environmental and administrative law. *Amici* have a long-standing interest in the proper interpretation of environmental statutes, such as the Clean Water Act ("CWA"). In particular, *Amici* have an interest in ensuring the correct interpretation of the CWA's jurisdictional provisions.

Collectively, *Amici* have spent decades interpreting and teaching both the CWA and the statutory interpretation principles at issue in this case. The purpose of this submission is to urge this Court not to address the jurisdictional question whether there is an "addition of a pollutant," as that phrase is used in Section 502(12), 33 U.S.C. § 1362(12), in situations in which pollutants are discharged—or, in the parlance of several courts, "redeposited"—from one point to another within a particular water body. *Amici* urge this for two reasons. First, we agree with Respondents and the United States that this issue simply is not present in this case. And second, we believe that this is an open issue, and one that is both complicated and exceedingly significant.

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[1] In accordance with S. Ct. Rule 37.3(a), all parties have consented to the filing of this brief. Petitioner and Respondents have done so by filing consent letters directly with the Clerk. Pursuant to S. Ct. Rule 37.6, Counsel for *Amici* states that no counsel for a party authored this brief in whole or in part and no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Most importantly, *Amici* believe that this Court should not resolve this complex jurisdictional issue in the absence of appropriate briefing. Proper analysis of the question at hand requires careful consideration of the intersection between four key statutory provisions under the CWA: Section 301(a), 33 U.S.C. § 1311(a) (establishing the basic jurisdictional dynamics of the CWA), Section 502(12), 33 U.S.C. § 1362(12) (defining "discharge of a pollutant," the key jurisdictional phrase in Section 301(a)), Section 402, 33 U.S.C. § 1342 (establishing the National Pollutant Discharge Elimination System ("NPDES") program), and Section 404, 33 U.S.C. § 1344 (establishing the "dredge and fill" permit program). The issues are further complicated by the fact that the U.S. Environmental Protection Agency ("EPA") has taken divergent positions under the two permit programs.

Neither the parties nor the United States has adequately briefed these issues. If the Court definitively rules on this question in the absence of such briefing, its ruling could have unforeseen consequences that transcend the NPDES program.

A further description of *Amici* is set forth in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

Respondents in this case brought an action under the citizen suit provision of the CWA, 33 U.S.C. § 1365, based on the simple notion that Petitioner was violating the conditions of its NPDES permit. Now, relying on an unfortunate paragraph in the

court of appeals' opinion, Petitioner seeks to reframe the case as one involving the jurisdictional question whether it has added pollutants to the navigable waters from a point source. This reformulation simply does not fit.

Most fundamentally, Petitioner *concedes* that its stormwater system adds pollutants to the relevant waterways and is properly "subject to the Clean Water Act's proscriptions." Pet. Br. 44. This concession shifts the focus from whether the statute applies to whether its requirements are being met. And under the NPDES program, those requirements are set forth *in the permit*. 33 U.S.C. § 1342(a)(1), (b)(1). This principle has three important corollaries. First, both EPA and citizens are empowered to enforce any and all NPDES permit requirements. *See* 33 U.S.C. §§ 1319(b), (d), 1365 (a)(1)(A), (f)(6). Second, a permittee cannot collaterally attack its permit requirements in an enforcement proceeding. 33 U.S.C. § 1369(b)(2). And third, subject to narrow exceptions, compliance with a permit is deemed to be compliance with the CWA. 33 U.S.C. § 1342(k).

In line with these principles, this case involves nothing more than an issue of permit interpretation. The Court should reject Petitioner's effort to recast the case as one involving jurisdictional dynamics. Because this case involves permit enforcement, *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"), is simply inapposite.

If, however, this Court deems the jurisdictional questions to be relevant, it should first recognize that

the relevant portion of the *Miccosukee* opinion constitutes dictum, not a holding. In that case, this Court determined that the Tribe had conceded there would be no jurisdiction if the two channels of water were considered to be two parts of the same water body. 541 U.S. at 109–10. Thus, this Court's treatment of the relevant legal principle was based on the parties' "agreed-upon law." *Id.* at 104. As such, this Court had no occasion to consider the many complexities involved in resolving this issue.

Beyond that, there are sound jurisprudential reasons why this Court should not consider the "addition" question here. As discussed in Section III, below, this issue is a statutory minefield, involving both the NPDES and "dredge and fill" permit programs. This issue also poses difficult questions involving the intersection of this Court's opinions in *Clark v. Martinez*, 543 U.S. 371 (2005) (holding that courts cannot give the same word or phrase in a statutory provision different meanings in different contexts), and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (holding that courts should defer to reasonable agency interpretations of ambiguous statutory language, so long as the agency has spoken with the force of law). This is because EPA, with the acquiescence of the U.S. Army Corps of Engineers ("the Corps") in the Section 404 context, has taken contradictory positions regarding whether a pollutant must come from the "outside world" in order for a discharge of a pollutant to constitute an "addition" within the meaning of Section 502(12). While EPA historically has not chosen to regulate these

movements of pollutants under the NPDES program, *see, e.g., Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), both EPA and the Corps have long asserted jurisdiction over redeposits of dredged spoil within the same water body. *See, e.g.*, 40 C.F.R. § 232.2(1) (EPA regulation); 33 C.F.R. § 323.2(d)(1) (Corps regulation). Indeed, that latter scenario is the very lifeblood of the "dredge" component of Section 404's "dredge and fill" permit program; the vast majority of "dredged material" cases involve that very fact pattern.

Given these complexities, it is clear that neither Petitioner nor Respondents (nor the United States) has adequately briefed the "addition" question in this case. If the Court deems the jurisdictional issue to be relevant, it should at the very least require further briefing addressing these concerns.

ARGUMENT

I. RESPONDENTS MAY ENFORCE THE RELEVANT PERMIT CONDITIONS; PETITIONER MAY NOT COLLATERALLY ATTACK THOSE PERMIT REQUIREMENTS

As the court of appeals noted, "'[t]he plain language of CWA § 505 authorizes citizens to enforce *all* permit conditions.'" Pet. App. 34 (quoting *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995) (emphasis in original)). Section 505 does this by authorizing citizens to bring suit against persons alleged to be in violation of any "effluent

standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1)(A) (2006). The phrase "effluent standard or limitation" is defined in Section 505(f), and includes "a permit or condition thereof issued under section [402] of this title. . . ." 33 U.S.C. § 1365(f)(6) (2006). Because Section 402 establishes the NPDES permit program, the language of Section 505(f)(6) provides that citizens may enforce NPDES permit conditions in suits under Section 505.

This plain meaning must control absent a clearly expressed legislative intention to the contrary. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case the legislative history underscores the plain meaning of Section 505(f)(6). Most significantly, the Senate Report accompanying the passage of the CWA in 1972 explained in unmistakable terms that "in addition to violations of section 301(a) [permit-less discharges], citizens are granted authority to bring enforcement actions for the violation of . . . *any* condition of *any* permit issued under section 402." Federal Water Pollution Control Amendments of 1972, S. REP. NO. 92-414 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747 (emphasis added).

Related to this, both the CWA and California law bar any collateral attack on Petitioner's permit. Section 509(b)(2) of the CWA makes this explicit with regard to EPA-issued permits. 33 U.S.C. § 1369(b)(2) (2006) (precluding review "in any civil or criminal proceeding for enforcement" of any "[a]ction of the Administrator with respect to which review could have been obtained under" Section 509(b)(1), which

includes "issuing or denying" any NPDES permit). As authorized under Section 304(i), 33 U.S.C. § 1314(i) (2006), EPA extended this dynamic to State-issued permits through its "duty to comply" regulation, which on its face applies to State programs. 40 C.F.R. § 122.41(a) (2012) ("Any permit noncompliance constitutes a violation of the Clean Water Act."). As recognized by the D.C. Circuit, this is a permissible interpretation of the CWA. *Gen. Motors Corp. v. EPA*, 168 F.3d 1377, 1381–83 (D.C. Cir. 1999) ("Certainly the EPA, acting in accordance with [an earlier case], the division of authority in the Act between state and federal permitting agencies, and the Senate Committee's expectation that enforcement proceedings would be straightforward and speedy, could reasonably interpret the Act to remit to a state forum any attack upon the validity of a state permit.").

As Respondents point out, California law follows suit. Resp. Br. 44 (citing Cal. Water Code §§ 13320, 13330). Indeed, Petitioner and its co-permittees filed a series of unsuccessful challenges to its permit in state court. *Id.* at 44–46. Seen in this light, both California law and comity concerns preclude any collateral attack regarding the appropriateness of the permit's terms.

II. *MICCOSUKEE* DOES NOT RESOLVE THE QUESTION UPON WHICH THE COURT GRANTED CERTIORARI

Respondents, Petitioner, and the United States summarily agree on the answer to the question presented. That is, they agree that the "transfer of

water through a concrete channel within a single river does not constitute a discharge of pollutants from a point source under the Clean Water Act." Resp. Br. 1; Pet. Br. 27; U.S. Br. 19. However, this position rests on the incorrect assumption that the relevant analysis in *Miccosukee* constituted a holding in that case. It did not. The Court's treatment of the meaning of "discharge" in *Miccosukee* was based on the parties' "agreed-upon law." 541 U.S. at 104, 109–12. As such, it did not establish binding precedent and the meaning of "discharge" thus remains an issue unsettled by this Court. *See Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363 (2006) (treating an assumption about the law in a prior case as dictum and refusing to apply that assumption when "[c]areful study and reflection have convinced [the Court] . . . that that assumption was erroneous").

In *Miccosukee*, this Court characterized the "discharge" issue as involving the application of "agreed-upon law to disputed facts." *Miccosukee*, 541 U.S. at 104; *see also id.* at 109 (noting that the Tribe "does not dispute" that if the canal and reservoir at issue factually constitute the same water body then "pumping water from one into the other cannot constitute an 'addition' of pollutants"). Because the only controversy regarding this issue was factual, the legal question was not decided by the Court and the Court's acquiescence in the parties' legal position reflected an untested assumption about the law that is not binding. *See Katz*, 546 U.S. at 363 (noting that this Court is not bound to follow its own "dicta in a prior case in which the point now at issue was not fully debated"); *see also Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821) ("It is a maxim not to be

disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.")[2]

Further, this Court should hesitate to adopt law that has not been subjected to adversarial dispute. *See United States v. Crawley*, 837 F.2d 291, 293 (7th Cir. 1988) (noting that where an issue is "not presented as an issue," it has not been "refined by the fires of adversary presentation" and there is reason to believe it is not a "fully measured judicial pronouncement . . . and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended"); *see also* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev.

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[2] This Court's decision in *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006), also does not resolve the meaning of "addition" here. First, the Court expressly distinguished the issue in that case from Section 402 because it involved the meaning of "discharge" under Section 401, 33 U.S.C. §1341 (2006). *Id.* at 381 ([T]he understanding that something must be added in order to implicate § 402 does not explain what suffices for a discharge under § 401."). Second, while the Court mentioned the "addition" discussion in *Miccosukee, see id.* at 381 n.6, and noted that the Court "accepted the shared view of the parties," *id.* at 381, its discussion of *Miccosukee* did not transform it into binding precedent on this question. *See United States v. Dixon*, 509 U.S. 688, 706 (1993) ("Quoting . . . suspect dictum multiple times . . . cannot convert it into case law."); *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995) ("Breath spent repeating dicta does not infuse it with life.").

1249, 1261–62 (2006) ("Our readiness to trust a court's rulings of law depends on the assumption that the adverse parties will each vigorously assert the best defense of its positions."). In *Miccosukee*, the question regarding whether moving pollutants within a water body can constitute an "addition" was not presented as an issue requiring the Court's resolution because both lower courts "rested their holdings on the predicate determination that the canal and reservoir are two distinct water bodies." 541 U.S. at 99. Acceptance of the parties' untested view of the law on an issue seemingly immaterial to the litigation would undermine an important purpose of the adversarial process, which is to safeguard accuracy.[3]

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[3] Courts have applied the same analysis in the analogous context of preclusion law, and for similar reasons. In the collateral estoppel context, for example, the general presumption is that stipulations of law are not preclusive. This presumption holds unless it is clear the parties intended a preclusive effect. *See e.g.*, *Pelham Hall Co. v. Hassett*, 147 F.2d 63, 67 (1st Cir. 1945) (noting parties should not be precluded "from raising a relevant point of law unless it appears beyond doubt that the precise point was actually contested and decided (not merely assumed) in the prior litigation"); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 992 (5th Cir. 1977) (When a party "concedes or stipulates the issue upon which the court bases its judgment, the issue is not conclusively determined for purposes of collateral estoppel unless it is clear that the parties so intended."); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982) (An issue is not actually litigated "if it is the subject of a stipulation between the parties" although it may be binding "if the parties have manifested an intention to that effect."). The purpose of this limitation on stipulation is that the legal question, when conceded, has lost the safeguard of the

Moreover, even if the relevant pronouncement in *Miccosukee* were not technically dictum, this Court should be reluctant to conclude that it established binding law because the issue was not fully reviewed. *See Cohens*, 19 U.S. at 399 (declining to give weight to the Court's treatment of an issue that was not "investigated with care, and considered in its full extent"). This Court has exhibited a healthy skepticism about being bound by legal assertions that have not been the subject of plenary review. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 (1979) (refusing to resolve an issue on *stare decisis* grounds that had not received plenary review, and recognizing a lesser degree of precedential value for summary dismissals than for "opinion[s] of th[e] Court after briefing and oral argument on the merits").

Miccosukee presents a perfect example of why courts should be reluctant to treat untested stipulations of "agreed-upon law" as establishing holdings. As will be seen in Section III, below, the question whether redeposits of pollutants within waterways should be deemed "addition[s]" within the meaning of Section 502(12) of the CWA involves complex statutory dynamics, conflicting agency interpretations, and many years of sometimes contradictory case law. Neither the parties nor the

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adversarial process. *Anderson*, 562 F.2d at 992 n. 32 ("Adversary litigation is an important safeguard in the judicial process."). This Court should not adhere to the point of law in *Miccosukee* because it was not actually contested and decided.

United States briefed any of the underlying tensions in *Miccosukee*; nor have they done so here. This Court should be reluctant to conclude that it has established binding precedent on a complex subject absent the safeguards of an adversarial process. As Justice Kennedy once put it, these issues are "best reserved for a later case" because "neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (referring to Art. II and separation of powers issues implicated in CWA case).

III. THE JURISDICTIONAL ISSUES RELATING TO DISCHARGES WITHIN WATERS OF THE UNITED STATES ARE COMPLICATED AND HAVE IMPLICATIONS WELL BEYOND THIS CASE

Section 301(a) is the fundamental jurisdictional provision of the CWA. It provides that, except as in conformance with specified sections of the Act, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2006). Two of the referenced exceptions to this prohibition are Sections 402 and 404. Section 402(a) allows EPA to issue permits "for the discharge of any pollutant. . . notwithstanding section [301(a)]," 33 U.S.C. § 1342(a) (2006), and Section 404(a) allows the Corps to issue permits "for the discharge of dredged or fill material." 33 U.S.C. § 1344(a) (2006); *see also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality) (recognizing that Sections 402 and 404 are "exceptions" to the Section 301 prohibition on the

discharge of any pollutant and that EPA and the Corps have the authority to issues permits under the respective provisions). The key point here is that Section 301(a) underlies both of these programs. If there is no "discharge of [a] pollutant," there is no jurisdiction for purposes of either Section 402 or Section 404.

Section 502(12) defines the phrase "discharge of a pollutant" to require four elements: (1) an addition; (2) of a pollutant; (3) to the navigable waters; (4) from a point source. 33 U.S.C. § 1362(12) (2006). The term "addition" is the only one of the four jurisdictional elements from the definition of "discharge of a pollutant" that is not further defined in Section 502. As this Court recognized in *Miccosukee*, the key jurisdictional question in this context is whether there is an "addition" of a pollutant when pollutants from within a water body are discharged at a different point within the same water. With no one disputing the issue in the case, and without further analysis, this Court merely quoted an earlier bit of dicta from the Second Circuit: "[I]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Miccosukee*, 541 U.S. at 109–10 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001) ("*Catskill*")). While the *Catskill* analogy has some surface appeal, it ignores the structure of the CWA.

Though the federal government has properly and consistently regulated redeposits under Section 404 of the Act, the government's approach to similar "addition" questions under Section 402 of the Act has

not been consistent. The meaning of addition is an open question and should remain so here because of its complex jurisdictional implications under the Act.

A. Redeposits Are Properly Regulated Under Section 404

As a starting place, it is important to establish that redeposits of material within the same water body are properly regulated under CWA Section 404. The plain language of the Act, its legislative history, the agencies' interpreting regulations, and all cases that have addressed this issue support the conclusion that a pollutant need not come from outside of the water body to constitute an "addition" in the context of Section 404 discharges.

Section 404(a) specifically contemplates that the Corps will issue permits for discharges of dredged material. 33 U.S.C. § 1344(a). Section 502(6) underscores this dynamic, defining the term "pollutant" to expressly include "dredged spoil." 33 U.S.C. § 1362(6). As many courts have noted, the fact that Sections 301(a) and 404(a), taken together, govern discharges of dredged material strongly suggests that regulated pollutants need not come from outside of the waters of the United States. In the oft-quoted language of the Fifth Circuit, "'dredged' material is by definition material that comes from the water itself. A requirement that all pollutants must come from outside sources would effectively remove the dredge-and-fill provision from the statute." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983); *see also infra* n. 4.

The legislative history fully supports this reading. Senator Ellender, who sponsored the floor

amendment that first gave the Corps permitting authority over discharges of dredged material, noted that these discharges involve "moving spoil material from *one place in the waterway to another, without the interjection of new pollutants.*" 117 CONG. REC. 38853 (Nov. 2, 1971) (statement of Sen. Ellender) (emphasis added); *see also id.* ("The disposal of dredged material does not involve the introduction of new pollutants; it merely moves the material from one location to another.").

Further, Congress acted in reliance on this understanding in adopting the 1977 Amendments to the CWA. Those Amendments created conditional exemptions for specified types of discharges involving dredged material, but provided that the exemption would be unavailable if the impacts on the waters of the United States would be significant. 33 U.S.C. § 1344(f). Tellingly, these conditional exemptions include several that involve the relocation of dredged material within the same water body, such as discharges associated with "plowing" and "the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C).

EPA and the Corps have rules bearing out these dynamics. First, both agencies define the term "dredged material" to mean "material that is excavated or dredged from waters of the United States." 40 C.F.R. § 232.2 (2012) (EPA regulation); 33 C.F.R. § 323.2(c) (2012) (Corps regulation). Their rules also indicate that the phrase "discharge of dredged material" includes not only "[t]he addition of dredged material to a . . . discharge site located in waters of the United States," but also "[a]ny addition, including redeposit other than incidental fallback, of dredged

material . . . into waters of the United States . . . ." 40 C.F.R. § 232.2 (EPA regulation); 33 C.F.R. § 323.2(d)(1) (Corps regulation).

In line with the above, it is unsurprising that there is extensive judicial authority supporting the application of Section 404 in situations where the discharge of dredged spoil occurs within the same aquatic system from which it was dredged; in fact, the courts of appeals have been virtually unanimous on this score.[4] The only case that is even slightly

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[4] *See United States v. Brace*, 41 F.3d 117, 121 (3d Cir. 1994) (farmer violated the CWA when he "cleared, mulched, churned, leveled, and drained the formerly wooded and vegetated site" and "paid for excavation in the site and the burying of plastic tubing or drainage tile" without a 404 permit); *United States v. Deaton*, 209 F.3d 331, 335–36 (4th Cir. 2000) ("What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.") (emphasis in original); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923–25 (5th Cir. 1983) (noting, *inter alia*, that "[t]he word 'addition', as used in the definition of the term 'discharge,' may reasonably be construed to include 'redeposit'"); *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) (following *Deaton* and *Avoyelles* on facts substantially identical to those in *Deaton*); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 947–49 (7th Cir. 2004) (following *Avoyelles* in expressly rejecting the argument that it mattered that the dredged materials were being redeposited into the same aquatic system); *Green Acres Enterprises, Inc. v. U.S.*, 418 F.3d 852, 856 (8th Cir. 2005) (requiring a 404 permit for excavation and dredging activities conducted in connection with levee maintenance that involved more than incidental fallback); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002) (affirmance by an equally-divided Court) ("deep ripping" in wetlands "can constitute a discharge of a pollutant"); *United*

discordant is the D.C. Circuit's decision in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), in which the court determined that the Corps overstepped its statutory authority by defining "discharge of dredged material" to include incidental fallback. Even there, however, the court went on to indicate its general agreement with *Avoyelles* and its progeny. It started by quoting the above-mentioned language from *Avoyelles* regarding the concern about reading the dredge-and-fill provisions out of the law. *Id.* at 1405. It continued in the following terms:

> But we do not hold that the Corps may not legally regulate some forms of redeposit under its § 404 permitting authority. We hold only that by asserting jurisdiction over "*any* redeposit," including incidental fallback, the [rule] outruns the Corps's statutory authority. Since the Act sets out no bright line between incidental fallback on the one hand and regulable redeposits on the other, a reasoned attempt by the agencies to draw such a line would merit considerable deference.

Id.[5]

States v. Hubenka, 438 F.3d 1026, 1035 (10th Cir. 2006) ("[U]se of a bulldozer to move river bottom materials in order to construct . . . dikes unquestionably falls within the scope of [Corps' regulations].").

[5] What is equally telling is the overall percentage of dredged-material cases in which the dredged spoil is redeposited into the same aquatic system from which it is taken. In our research, we identified 97 reported decisions under Section 404 involving

B. The "Addition" Question is Complicated Under Section 402 and Should Not Be Decided in this Case

The clarity of the above approach to the "addition" question vanishes when one considers the same issues in the context of Section 402. As evidenced by this case, even Respondents are disinclined to argue that CWA jurisdiction should be triggered by the mere channelization of polluted water through a culvert or the like. Moreover, EPA has long taken the position that dams do not require NPDES permits, even where their operation results in the discharge of pollutants, such as sediments, that would otherwise be collected in the water behind the dam. And this position has been met with some judicial approval. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (concluding that "addition" is ambiguous and deferring to EPA's interpretation that water passing through a dam was not an "addition" because the

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dredged material, as distinct from fill material. In only two of those decisions did it appear that the dredged material either had been or was to be placed or discharged into a wholly separate body of water. *See Save Our Sound Fisheries Ass'n v. Callaway*, 387 F. Supp. 292, 294–95 (D.R.I. 1974) (regarding dredged spoil generated from "the removal of three shoals from the Providence River" that was proposed to be discharged at the Brenton Reef site off the coast of Rhode Island); *S. La. Envt'l Council, Inc. v. Sand*, 629 F.2d 1005, 1010 (5th Cir. 1980) (upholding a Section 404 permit authorizing the discharge of dredged spoil from Bayou Black and Bayou Boeuf into Avoca Island Lake, near Morgan City, Louisiana "to facilitate the movement of offshore drilling rigs and related marine equipment").

dam did not "physically introduce[] a pollutant from the outside world"); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (relying on *Gorsuch* to conclude that the deposit of water containing "entrained fish" generated by a turbine was not an "addition" because the fish did not come from the outside world). More recently, EPA promulgated its "Water Transfers Rule," which exempts from the NPDES program conveyances of water, even when they contain pollutants, from one water course to another, so long as the transferred water is not subjected to intervening industrial, municipal, or commercial use. 40 C.F.R. § 122.3(i) (2012); 73 Fed. Reg. 33697 (June 13, 2008).

The statutory waters are further muddied when one considers whether it is permissible for either the agencies or the courts to take this bifurcated approach, analyzing the "addition" question quite differently in the Section 402 and 404 contexts. In *Clark v. Martinez*, 543 U.S. 371 (2005), this Court held that courts cannot interpret a word or phrase in a particular statutory provision differently in different factual contexts. This is because "[t]o give these same words a different meaning for each category [of aliens] would be to invent a statute rather than to interpret one." *Id.* at 378; *see also Unites States v. Santos*, 553 U.S. 507, 522–23 (2008) (plurality opinion) ("*Clark v. Martinez* held that the meaning of words in a statute cannot change with the statute's application. To hold otherwise would render every statute a chameleon and would establish within our jurisprudence . . . the dangerous principle that judges can give the very same statutory text

different meanings in different cases.") (internal quotations omitted).

It is an open question whether *Clark v. Martinez* applies in the context of deference to agency interpretations under *Chevron*. It is well established that courts afford considerable deference to reasonable agency interpretations of ambiguous statutory provisions. *See, e.g., Chevron,* 467 U.S. at 843–44 (When the agency charged with implementing a statute interprets an ambiguous provision, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). And this Court has recognized that EPA can interpret the same ambiguous term or phrase differently when it is used in separate or cross-referenced provisions with different policy dynamics. *See, e.g., Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007) (concluding that incorporating a definition of the same term from one Clean Air Act program in another program did not "eliminat[e] the customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term"). But here the relevant phrase, "addition of [a] pollutant," is used only once, in the definition of "discharge of a pollutant" in Section 502(12). 33 U.S.C. § 1362(12). That same definition establishes the jurisdictional requirements for *both* the Section 402 and 404 permitting programs. Thus it remains to be seen how much discretion is afforded to an agency in its

interpretation of the same term in the same provision.[6]

Should this question be properly presented to this Court, the interpretation of "addition," as used in

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[6] Few lower courts have addressed whether *Clark v. Martinez* limits the discretion that agencies would otherwise possess under *Chevron*, let alone under the Court's more recent decision in *Duke Energy*. At least one circuit has indicated that even under *Clark v. Martinez*, an agency may interpret the same statutory provision to have different meanings in different contexts so long as the agency explains its reason for doing so and its interpretation is reasonable. *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363, 1370–72 (Fed. Cir. 2011) (rejecting the argument that *Clark v. Martinez* means the agency's inconsistent interpretation of a term is deemed unreasonable and noting that the agency's interpretation will be upheld so long as it "provide[s] an explanation for why the statutory language supports its inconsistent interpretation"). There is a circuit split regarding whether the Attorney General's interpretation of the provision at issue in *Clark v. Martinez* should be afforded *Chevron* deference. *Compare Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1242 (10th Cir. 2008) ("[A] subsequent, reasonable agency interpretation of an ambiguous statute . . . is due deference notwithstanding the Supreme Court's earlier contrary interpretation of the statute.") *with Tran v. Mukasey*, 515 F.3d 478, 481 (5th Cir. 2008) (concluding that the interpretation was not entitled to deference because the agency was bound by the Court's interpretation in *Clark v. Martinez*). *Tran*, however, failed to account for the discretion afforded to agencies under the *Brand X* doctrine. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

Section 502(12), would require consideration of the statutory and practical differences between Sections 402 and 404 and whether the term can have a different meaning as it relates to each permitting program. As discussed above, it is clear that Congress intended to regulate redeposits under Section 404; the inclusion of "dredged spoil" in the definition of statutory "pollutant[s]" demonstrates as much. What is less clear is whether or how pollutants within one water body are to be regulated under Section 402.

To be sure, if properly faced with the question, this Court would have several pathways to harmonize these issues. Initially, it could—and should—start with the plain language establishing that redeposits of dredged material fall within the scope of the Act. One conclusion, perhaps the soundest that could follow, is that the clear congressional intent under Section 404 combined with the shared definitional terms between the two programs indicates that pollutants need not come from the outside world to be "added" under *either* provision. Beyond that, the Court could conclude that given the different dynamics at play under Section 402, a different definition is appropriate. It would then need to recognize that these different interpretations of "addition" are acceptable in the two contexts, notwithstanding *Clark v. Martinez*. This Court's decisions in *Duke Energy* and the deference afforded to agencies under *Chevron* would likely support such a result.

Importantly, however, these dynamics and options demonstrate that this is an open question, and one that should not be decided in passing.

CONCLUSION

For the foregoing reasons, the Court should decline to address the "addition of a pollutant" issue.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

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AMICUS CURIAE BRIEF

No. 11-460

In the

Supreme Court of the United States

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR WESTERN COALITION OF ARID STATES ("WESTCAS") AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the Western Coalition of Arid States respectfully submits this brief as amicus curiae supporting reversal of the judgment below.[1]

INTEREST OF THE AMICUS

Members of the Western Coalition of Arid States ("WESTCAS") include more than one hundred municipal entities in Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, and Texas. WESTCAS is dedicated to encouraging the development of water programs and requirements that assure adequate supplies of high quality water for those living in the arid regions, while protecting the environment.

WESTCAS members operate storm sewers and other municipal flood-control facilities. WESTCAS

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[1] No counsel for any party authored any part of this brief and no one other than amicus curiae made any monetary contribution to the preparation and submission of this brief. No person other than amicus curiae, its members, or its counsel made any monetary contribution to its preparation or submission.

members are concerned that the Ninth Circuit's decision could hold them responsible for the discharges from other entities, and could impose on them requirements that cannot reasonably be attained.

SUMMARY OF THE ARGUMENT

This brief makes two points that the Court should be aware of when considering the question presented in this case. First, the Ninth Circuit made a serious error on an issue of great significance to every municipality: It held (contrary to Clean Water Act regulations) that the municipal owner of a storm sewer is responsible for *everything* that flows out of that storm sewer, including the stormwater and wastewater that industries and other municipal entities discharge through the storm sewer. Second, the Ninth Circuit imposed (contrary to Congressional intent) a requirement that appears impossible to attain, owing to natural conditions and other causes beyond the control of municipalities.

1. Clean Water Act regulations make the entities that discharge *through* municipal storm sewers responsible for their own discharges. The

regulations specify that when a permit (like the permit at issue here) covers multiple "co-permittees" who discharge through the same storm-sewer system, each co-permittee is responsible only for its own discharge. The Ninth Circuit did not consider the validity of these regulations. But by holding that the Los Angeles County Flood Control District (the "District") is responsible for the discharges of its co-permittees and all other entities that discharge through its storm sewers, the Ninth Circuit implicitly invalidated these regulations.

Municipalities should not be liable for the discharges sent through their sewers by other entities that are required by the Clean Water Act to obtain their own discharge permits. Congress could not possibly have intended to transfer the responsibility for industrial wastewater treatment, for example, from a discharging industry to a municipal owner of storm sewers. The industry created the industrial wastewater, and has the knowledge and facilities to provide appropriate treatment. The municipality did not create the wastewater, and does not have the knowledge or ability to provide treatment. Plainly, the

responsibility should stay with the industry, and nothing in the Clean Water Act suggests otherwise.

The Ninth Circuit's holding may arise from a misunderstanding of the *Miccosukee* case, in which this Court ruled that the Clean Water Act regulates "point sources that do not themselves generate pollutants." (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).) In *Miccosukee*, there was no question about *who* was discharging through the point source (if indeed there was a discharge), because only one entity was sending water through the pipe. In this case, there were as many as 84 cities, one county, thousands of regulated industries, and several sewage-treatment plants discharging their stormwater and dry-weather wastewater through the District's system. The Ninth Circuit should have concluded, consistent with the regulations, that each of these regulated entities was responsible for its own discharge.

2. The Ninth Circuit created another serious problem for municipalities. It strictly enforced a prohibition against causing exceedances of the standards that apply to ambient waters (i.e. the

"water-quality standards"). Municipalities are unlikely to be able to comply with this prohibition because of natural conditions (such as the bacteria in bird droppings, and the naturally muddy condition of many waters during wet weather) and other conditions beyond their control. When Congress specified that municipalities must implement stormwater controls to the "maximum extent practicable", it surely did not intend to impose requirements that could not reasonably be attained. Courts should be careful not to impose unattainable requirements on municipalities.

The Ninth Circuit, in short, improperly held that the owner of a storm sewer is responsible for everything that flows through that sewer, implicitly invalidated Clean Water Act regulations, and strictly enforced a prohibition that probably cannot be attained. These errors should be noted, and corrected.

ARGUMENT

I. THE NINTH CIRCUIT INCORRECTLY HELD THAT THE DISTRICT IS LIABLE FOR DISCHARGES FROM OTHER ENTITIES

A. EPA Regulations Apply Clean Water Act Requirements To Discharges *Through* Storm Sewers

In the *Miccosukee* case, this Court held that the Clean Water Act regulates "point sources that do not themselves generate pollutants." (*South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).) *Miccosukee* involved a single entity pumping water through a single pipe. (*Id.* at 98-99.) This Court did not consider the question relevant to municipal storm sewers: Can there be more than one discharge when more than one entity sends stormwater or wastewater through the same pipe? The answer that is consistent with Clean Water Act regulations, and that best implements Congressional intent, is: Yes.

When several municipalities discharge stormwater through a single system of storm sewers, regulations issued by the U.S. Environmental Protection Agency ("EPA") allow for (but do not require) a system-wide permit covering all the

discharges. (40 C.F.R. § 122.26(a)(3)(ii).)

A municipality can choose to apply for an individual permit covering only those "discharges . . . for which the operator is responsible", or it may join other municipal entities and apply as a "co-permittee" for a permit covering more than one entity. (40 C.F.R. § 122.26(a)(3)(iii)(B), (A).) A co-permittee is *not* held jointly and severally liable for the discharges of the other co-permittees. On the contrary, a co-permittee is responsible only for its own discharge. (40 C.F.R. § 122.26(a)(3)(vi) ("[c]o-permittees need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators").)[2] Here, a single Clean Water Act discharge permit (known as an "NPDES" permit) was issued to the Los Angeles County Flood Control District (the "District"), the county, and 84 municipalities. (*NRDC v. Los Angeles County Flood*

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[2] *See also* 40 C.F.R. § 122.26(b)(1) (co-permittee defined as "a permittee to a NPDES permit that is only responsible for permit conditions relating to the discharge for which it is operator"); 40 C.F.R. § 122.33(b)(3) ("[a]s a limited co-permittee, you [i.e. a small municipality discharging through a medium or large municipal system] will be responsible for compliance with the permit's conditions applicable to your jurisdiction").

Control District, 673 F.3d 880, 886 (9th Cir. 2011) ("*NRDC*").)

The Ninth Circuit recognized that the permit at issue applied to many co-permittees, and it even quoted the definition of co-permittee. (*NRDC* at 886.) It also quoted a permit provision implying that each entity was *not* responsible for the discharges of other entities. (*See id.* at 892 (permit specifies that "[d]ischarges . . ., *for which a Permittee is responsible* for [sic], shall not cause or contribute to a condition of nuisance", emphasis added).)

The District argued, consistent with these regulations and permit provisions, that each of the co-permittees was not responsible for the discharge of any other co-permittee. (*See id.* at 899 ("Defendants contend that by measuring mass-emissions downstream from where the pollutants entered the sewer system, it is not possible to pinpoint which entity, if any, is responsible for adding them to the rivers").)

The Ninth Circuit rejected this argument. Notwithstanding the fact that the District merely "conveys the collective discharges of the numerous 'up-sewer' municipalities", the Ninth Circuit held

that the District was responsible for the discharges of the up-sewer municipalities, and for everything else that comes out of the District's pipes:

> Because the mass-emission stations . . . are located in a section of the MS4 [i.e. the municipal separate storm sewer system] owned and operated by the District, when pollutants were detected they had not yet exited the point source into navigable waters. As such, there is no question over who controlled the polluted stormwater at the time it was measured or who caused or contributed to the exceedances when that was again discharged to the rivers—in both cases, the District.

(*Id.* at 899, comma omitted.) Our concern here is not with the factual location of the monitoring stations (which the District and Solicitor General agree are actually in the river, not in the sewers), but rather with the legal conclusion that the entity who controls the pipe is the discharger of everything that comes out of that pipe.

The Ninth Circuit was wrong.

B. The Ninth Circuit Implicitly Invalidated EPA Regulations

The Clean Water Act regulates the "discharge of a pollutant", which is defined to include "any *addition* of any pollutant to navigable waters from any *point source*". (33 U.S.C. § 1311(a), § 1362(12), emphasis added.) *Miccosukee* focused on the meaning of "point source", and concluded that "a point source . . . need only convey the pollutant to . . . 'the waters of the United States'". (*Miccosukee* at 105.) *Miccosukee* did not consider *who* is responsible for the addition of the pollutant through a point source, especially when there is more than one candidate.

The Ninth Circuit seems to have confused the holding in *Miccosukee*—that a point source can be a mere conveyance—with the quite different concept that the Clean Water Act applies to persons "who convey what is added by others":

> [T]he Clean Water Act does not distinguish between those who add and those *who convey what is added by others*—the Act is indifferent to the originator of water pollution.

(*NRDC* at 900, emphasis added.) This assertion is wrong. The Clean Water Act regulates the *addition* of a pollutant, not the conveyance of pollutants added by others.[3] In *Miccosukee* there was no question about who might be responsible for the addition (if indeed there was an addition) because there was only one entity sending water through the pipe at issue. (*Id.* at 98.) Here, however, there are as many as 84 cities, one county, thousands of industries, and several sewage-treatment plants discharging through the District's storm sewers. (See section I.C below.)

According to the Ninth Circuit, Congress did not intend to regulate the "individual sources of runoff" that send pollutants to the storm sewers; instead, Congress "put the NPDES permitting requirement at the municipal level". (*NRDC* at 894; see discussion in section I.C below.) This conclusion is inconsistent with EPA regulations, which specify that the Clean Water Act regulates

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[3] 33 U.S.C. § 1311(a) (regulating discharges of pollutants), § 1362(12) (defining "discharge of a pollutant" to include "any addition" of a pollutant, but not the conveyance of pollutants added by others); *see Miccosukee* at 106 ("the Act requires NPDES permits only when there is an addition of a pollutant to navigable waters", quotation marks omitted).

"discharges *through* pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." (*See* 40 C.F.R. § 122.2 (defining "[d]ischarge of a pollutant"), emphasis added.)[4] If the Ninth Circuit is right—if the Clean Water Act really is indifferent to the industries that send their pollutants through the storm sewers—then EPA is wrong, and these regulations are invalid. (*See Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504-505 (2d Cir. 2005) (invalidating EPA regulations attempting to impose requirements on point sources that did not discharge).)[5] By refusing to hold the co-permittees and contributing industries liable for their discharges, the Ninth Circuit implicitly invalidated EPA regulations that impose requirements on

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[4] *See also* 40 C.F.R. § 122.21 (imposing duty on dischargers of pollutants to apply for permit); § 122.26(a)(4) (requiring industries discharging through storm sewers to submit notification to municipality in addition to complying with §122.26(c)); §122.26(c) (requiring dischargers of industrial stormwater to apply for permit).

[5] "[U]nless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit".

co-permittees and other entities that discharge *through* storm sewers.

This Court has recognized that there is a difference between regulating discharges through conveyances, and regulating the conveyances themselves. In the *Rapanos* case, the plurality noted that the Clean Water Act

> does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters"

and that

> lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

(*Rapanos v. United States*, 547 U.S. 715, 743 (2006), emphasis in original.) The plurality also noted, however, that conveyances have been treated as point sources, and that "[s]ome courts have even adopted both the 'indirect discharge' rationale and

the 'point source' rationale in the alternative, applied to the same facts." (*Id.* at 744.)

The best way to resolve this issue is to accept the concept that more than one person can discharge—that is, add pollutants to the waters of the United States—through a single pipe or other conveyance. This concept fits the language of the Clean Water Act, which regulates persons, not pipes. (33 U.S.C. § 1311(a) ("the discharge of any pollutant *by any person* shall be unlawful", emphasis added).) This concept is consistent with the result in *Miccosukee* (the sole operator of a pipe is responsible for any discharge) and with its reasoning (the Clean Water Act regulates those persons that *add* pollutants to the waters of the United States, not necessarily those persons who generate the pollutants).

This concept—that more than one person can discharge through a single pipe—is inherent in EPA regulations, which specify that NPDES permits can be issued to co-permittees, each of which is responsible only for the discharges "for which they are operators" (See fn. 2 and accompanying text above.)

Finally, the concept is consistent with the common-sense conclusion that when an industry discharges through a storm sewer, the person doing the discharging is the industry, not the municipality that owns the sewer. A municipal storm sewer, like a public street, is a conveyance anyone can use. A municipality should no more be held liable for industrial discharges through its storm sewers than it should be held liable for industrial vehicles driven on its streets.

C. Municipalities Should Not Be Held Liable For Discharges Through Their Storm Sewers

The Ninth Circuit offered two rationales for its conclusion that the District was liable for everything flowing out of its storm sewers. Neither rationale justifies the conclusion.

The Ninth Circuit first asserted that Congress intended to make municipalities responsible "to ease the burden of administering the program":

> Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential "nightmare") . . ., Congress put the NPDES permitting requirement at the

> municipal level to ease the burden of administering the program.

(*NRDC* at 894, footnote omitted.) But the discharges at issue were not from "churches, schools and residential property"; they were from as many as 84 cities, one county, thousands of industries, and several sewage-treatment plants—each of which had already gone through the administrative permitting process. (*See id.* at 889-890 (identifying *permitted* entities discharging into "Watershed Rivers").)[6] Because these entities had already received permits, the Ninth Circuit's holding could not ease the administrative burden of issuing permits to them.

Congress specifically required EPA to issue (or deny) permits for stormwater discharges "associated with industrial activity" and from municipalities with populations greater than 100,000. (33 U.S.C. § 1342(p)(4).) Nothing in the Clean Water Act

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[6] The Ninth Circuit seems to have believed that all of these "up-sewer" entities are discharging through the District's storm-sewer system. Some of these entities may actually be discharging directly to waters of the United States. Nevertheless, at least some of the up-sewer entities must be discharging through the District's storm sewers: Most industries send their stormwater to municipal storm-sewer *pipes* (as opposed to surface channels), and storm-sewer pipes cannot reasonably be classified as waters of the United States.

suggests that municipalities are responsible for stormwater discharges from these industrial discharges, or that one municipality is responsible for the discharge from another municipality. The Ninth Circuit should not have concluded otherwise.

Nor is there anything in the Clean Water Act to suggest that municipalities are responsible for *dry-weather* flows through their storm sewers. Here, there may be as many as six sewage-treatment plants, and an unspecified number of industries, discharging through the system during dry weather. (*See NRDC* at 889-890 (identifying discharges to Watershed Rivers).)[7] The District, if it is a typical *flood-control* district, knows little or nothing about the treatment of sewage or industrial wastewater. It has little or no ability to treat anything that flows through its system; storm sewers are, after all, nothing more than pipes and surface channels. Yet the Ninth Circuit's decision makes the District

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[7] Municipal stormwater permits typically require the elimination of dry-weather flows, but "exceptions include discharges from NPDES-permitted industrial sources" (EPA, Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination Minimum Control Measure (January 2000, revised December 2005) (fact sheet) at 1, available at http://www.epa.gov/npdes/pubs/fact2-5.pdf (as of September 11, 2012).)

responsible for *everything* that flows out of its storm sewers, including the dry-weather flow from industries and sewage-treatment plants. Congress could not possibly have intended to transfer responsibility for sewage treatment and industrial-wastewater treatment from those who know how to provide treatment, and have the facilities to provide treatment, to municipalities that have neither the knowledge nor the ability.

The Ninth Circuit's second rationale was one of convenience, although it was couched as permit interpretation. The District's argument, according to the Ninth Circuit, would "emasculate the Permit". (*NRDC* at 895.) Why? Because there would be no way to determine compliance: "it is . *impossible* to identify the particular storm drains that had, for instance, some fecal bacteria which contributed to a water-quality violation" (*NRDC* at 899, emphasis added.) But although it might be *difficult* to monitor the separate discharges of 84 cities and one county, the Ninth Circuit presented nothing to suggest that the monitoring would be *impossible*. There are more than 1,600 industries discharging stormwater to the local rivers (*NRDC* at 889-890), and each is

monitoring its own discharge.[8]

In any case, convenience is no reason to hold one entity liable for the discharge from another entity. Taking and due-process principles, at the very least, should caution against the casual imposition of such unusual requirements.

Nor can the Ninth Circuit's decision be justified as an effort to promote the environmental goals of the Clean Water Act. If the goal is to reduce the discharge of pollutants associated with industrial activity (*see* 33 U.S.C. § 1342(p)(3)(A)), it makes sense to regulate the industries discharging those pollutants. It makes no sense to transfer that responsibility to flood-control districts and other municipal entities.

Municipalities, in short, should not be held liable for everything flowing out of their sewers.

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[8] Monitoring is required by California's general industrial stormwater permit. (California State Water Resources Control Board, General Industrial Stormwater Permit (1997) at 24-25, available at http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/induspmt.pdf (as of September 11, 2012).)

II. MUNICIPALITIES SHOULD NOT BE REQUIRED TO ATTAIN IMPOSSIBLE GOALS

The Clean Water Act requires municipalities to implement "controls to reduce the discharge of pollutants [from storm sewers] to the maximum extent practicable". (33 U.S.C. § 1342 (p)(3)(B)(iii).) No one doubts that there are practicable controls, and EPA has required municipalities to implement them. (*See e.g.* 40 C.F.R. § 122.34(b) (identifying "minimum control measures").) There is disagreement, however, about whether Congress intended that municipalities should *also* be subject to the prohibition on causing exceedances of water-quality standards. (*See NRDC* at 885-886 (explaining effluent limits and water-quality standards); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163-1167 (9th Cir. 1999) (holding that the prohibition on causing exceedances of water-quality standards does not apply to municipalities, but concluding in dictum that EPA has authority to impose that prohibition).)

Missing from the Ninth Circuit's analysis of this issue is any consideration of whether

municipalities *can* comply with the prohibition. There is good reason to believe that they cannot. Yet Congress surely did not intend to impose impossible requirements on municipalities. Congress would not have specified that municipalities must implement controls only to the "maximum extent practicable" if Congress intended to impose impossible requirements.[9]

The Ninth Circuit acknowledged a preference for flexibility: "'Congress recognized that permit requirements for municipal separate storm sewer systems should be developed in a flexible manner . '" (*NRDC* at 895, quoting EPA at 55 Fed.Reg. 48,038.) The Ninth Circuit seems to have thought that the prohibition on causing exceedances of water-quality standards provided for flexibility: "water-quality standards may be preferable over more-difficult-to-enforce effluent limitations." (*Id.*)

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[9] In *Defenders of Wildlife*, the Ninth Circuit noted that the "maximum extent practicable" provision also allows for "such other provisions as [EPA] or the State determines appropriate for the control of such pollutants." (*Defenders of Wildlife* at 1166-1167, quoting 33 U.S.C. § 1342 (p)(3)(B)(iii).) But nothing suggests (and the Ninth Circuit did not hold) that this provision allows for requirements that municipalities cannot attain. Requirements that cannot reasonably be attained cannot be "appropriate"

Actually, the prohibition on causing exceedances of water-quality standards could not be more rigid. It makes no allowance for anything.

For three reasons, municipalities are not likely to be able to comply with the prohibition: (1) natural conditions generate excessive amounts of pollutants, (2) municipalities generally cannot treat stormwater, and (3) water-quality standards are not designed for actual wet-weather conditions.

Stormwater washes the land. It washes, into the nearest stream, bear droppings from the woods, cow droppings from the fields, and dog droppings from the city streets. All these droppings contain fecal bacteria, and all the streams into which they are washed do too. When millions of bison grazed the Great Plains, enormous numbers of fecal bacteria must have been washed into the local streams. The bison may be gone, but there are millions of birds in most cities, birds that are often found near water and that generate immense amounts of droppings and fecal bacteria. Geese, for example, are renowned for the speed at which they produce excrement.

Scientific methods can be used to determine which animals provided the fecal bacteria in a water

sample. A recent report prepared for EPA reviewed the methods, applied them to waters in several states, and found that the main sources of fecal bacteria differed from place to place: birds, deer, raccoons, and rodents were most frequently identified in one study; ruminants and humans in a second; birds and dogs in a third; wildlife and livestock in a fourth; geese and sheep in a fifth; and sheep and horses in a sixth. (Tetra Tech, Using Microbial Source Tracking to Support TMDL Development and Implementation (April 2011) at 35, 39, 43, 47, 50, 58.)[10]

Fecal contamination is not the only natural pollutant. Natural waters are often muddy. Although water may run clear over rocks in the mountains, water picks up mud when it flows across the flats. The faster it flows, the more mud it picks up. During wet weather, rivers with easily eroded bottoms and banks (which sometimes have names like the Red River, the Yellow River, or the "Big Muddy") are unlikely ever to be in compliance

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[10] Available at http://www.epa.gov/region10/pdf/tmdl/mst_for_tmdls_guide_04_22_11.pdf (as of September 5, 2012).

with water-quality standards calling for low levels of turbidity or "suspended solids".[11]

Of course, pollutants do not come only from natural sources. According to EPA, fecal contamination "can come from untreated sewer discharges (e.g. sewer overflows or sewage treatment plant malfunctions), failing septic systems, storm water, boat wastes, pets, wildlife (e.g. geese) and farm animals."[12] Many of these—failing septic systems, boat wastes, wildlife, and farm animals—are beyond the control of most municipalities. Although municipalities may have some control over dog droppings (which might be susceptible to street sweeping and scoop-the-poop laws), and to discharges from their own sewage-treatment plants (which are

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[11] This mud is not necessarily bad. In one of the most famous California water-rights cases, Amelia Herminghaus sued to prevent upstream dams from capturing the high river flows that dumped so much good, fertile mud on her land: "the augmented natural flow . . flowed naturally out and over the plaintiffs' said lands . . . and deposited thereon a very fertile silt which enriched said land and caused an abundant growth of grasses thereon" (*Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 93 (1926).) She won, and the California Constitution was amended to override that decision. (*National Audubon Society v. Superior Court*, 33 Cal.3d 419, 442 (1983).)

[12] EPA Region 1, Questions And Answers (undated), available at http://www.epa.gov/region1/eco/beaches/qa.html (as of September 5, 2012).

separately permitted and regulated), these controls seem unlikely to ensure compliance with water-quality standards for bacteria, or to have much effect on wet-weather bacterial levels in the ambient waters.

When it comes to mud, however, there is no doubt. Nothing anyone can do will convert the Big Muddy into a clear mountain stream.

It may seem strange that municipalities can turn raw human sewage into high-quality effluent, and yet have little or no effect on stormwater. But municipalities generally cannot treat stormwater. Most cities have separate sewers, consisting of "sanitary" sewers that carry sewage and other wastewater to municipal sewage-treatment plants, and storm sewers that carry stormwater to nearby waters. (Older cities, like Washington DC and San Francisco, have combined sewers in which one set of pipes carries both sewage and stormwater.) Storm sewers are pipes and surface channels that are designed to prevent flooding. They do nothing other than convey stormwater.

Natural conditions and the lack of treatment facilities might not be insurmountable problems if

water-quality standards were derived from actual wet-weather data and realistic assessments of what can be attained. But they are not. Numeric standards ("criteria") are generally developed from laboratory experiments using test organisms.[13] "Narrative" standards are vague appeals for ambient waters to be free from undesirable qualities—for example, that waters "shall be free from substances attributable to wastewater discharges or other pollutant sources that: Settle to form objectional [sic] deposits" [14]

The Ninth Circuit was too quick to dismiss the District's request to apply the prohibition (i.e. on causing exceedances of water-quality standards) with a light hand. (*NRDC* at 897, citing *Building Industry Association of San Diego County v. State*

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[13] *See* EPA, Guidelines for Deriving Numerical National Water Quality Criteria for the Protection Of Aquatic Organisms and Their Uses, at 11-14 (1985, electronic version 2010) (standards to protect fish and other aquatic organisms). (Available at http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/upload/85guidelines.pdf (as of September 11, 2012).) Bacterial criteria, which were developed from dry-weather bacterial levels, are an exception.

[14] EPA, Water Quality Standards Handbook, § 3.5.2 (2d ed. 2012) (available at http://water.epa.gov/scitech/swguidance/standards/handbook/chapter03.cfm#section5 (as of September 11, 2012)).

Water Resources Control Board, 124 Cal.App.4th 866 (2004).) In the *Building Industry Association* case, petitioner argued that it was impossible to comply with the prohibition, but the argument failed because there had been no factual showing before the agency. (*Building Industry Association* at 888.) The California court of appeal suggested that the impossibility arguments were "premature" ("we cannot determine with any degree of certainty whether this obligation [the prohibition on causing exceedances of water-quality standards] would ever be imposed, particularly if it later turns out that it is not possible for a Municipality to achieve that standard") and that the petitioner's "doomsday arguments" were overblown ("it is not at all clear that a citizen would have standing to compel a municipality to comply with a water quality standard despite an ongoing iterative process"). (*Id.* at 890-891.) Now that the citizen suits have begun, courts should allow municipalities to make the necessary factual showing, and should be careful to avoid imposing on municipalities requirements that cannot reasonably be attained.

CONCLUSION

The Ninth Circuit improperly held that the District is responsible for everything that flowed out of its system, implicitly invalidated EPA regulations, and strictly enforced a prohibition that probably cannot be attained. These errors should be noted, and corrected.

Respectfully submitted.

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September 12, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-460

Supreme Court, U.S.
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In The
Supreme Court of the United States

CORRECTED COPY

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* WESTERN URBAN WATER COALITION, CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, LOWER ARKANSAS VALLEY WATER CONSERVANCY DISTRICT, CITY OF AURORA, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, CITY OF PHOENIX WATER SERVICES DEPARTMENT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, EAST BAY MUNICIPAL UTILITY DISTRICT, SANTA CLARA VALLEY WATER DISTRICT, SOUTHERN NEVADA WATER AUTHORITY, TRUCKEE MEADOWS WATER AUTHORITY, METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY, AND CENTRAL UTAH WATER CONSERVANCY DISTRICT IN SUPPORT OF PETITIONER LOS ANGELES COUNTY FLOOD CONTROL DISTRICT

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QUESTION PRESENTED

Millions of residents of the western United States live in areas where water is naturally scarce. Their daily water supply depends upon thousands of water transfers by *Amici* and other water providers to meet their basic water needs. The question *Amici* will address is:

> Whether municipal separate storm sewer systems (MS4s) are legally distinguishable from water transfers, thus making this Court's holding in *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) inapplicable to this case?

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INTERESTS OF *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioner, Los Angeles County Flood Control District ("District"), urging reversal of the United States Court of Appeals for the Ninth Circuit.[1]

The Western Urban Water Coalition ("WUWC") is an association of the largest municipal water utilities in the western United States.[2] The goal of WUWC members is to provide a reliable, high-quality urban water supply for present and future population. WUWC members own and operate water management, water supply and hydroelectric projects. These projects consist of water conduits and reservoirs, including water transfer facilities. The continued, unimpeded operation of these facilities is essential to

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[1] Counsel for *Amici* Western Urban Water Coalition, *et al.*, authored this brief in its entirety, and no person or entity other than the *Amici* and their representatives made any monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of the intention of Western Urban Water Coalition, *et al.*, to file this brief. All parties have consented and written consents are submitted herewith.

[2] WUWC includes the following urban water utilities: Arizona – Central Arizona Water Conservation District, City of Phoenix; California – East Bay Municipal Utility District, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, Santa Clara Valley Water District; Colorado – City of Aurora, Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, Truckee Meadows Water Authority. Seattle Public Utilities, a WUWC member, is not participating in this *Amicus* brief.

the continued ability of WUWC members to serve the water needs of the major population centers of the west.

SUMMARY OF ARGUMENT

This case is not about water transfers. It is about storm water discharges. Specifically, the issue is whether the District's discharges of storm water from its municipal separate storm sewer system ("MS4") violated the Clean Water Act, 33 U.S.C. § 1251 *et seq.*

The Act generally prohibits the discharge of pollutants by point sources except in compliance with the National Pollutant Discharge Elimination System ("NPDES"). Storm water discharges from MS4s are explicitly subject to the NPDES requirements of the Act. Conversely, water transfers are not subject to NPDES requirements, and, in fact, are not even mentioned in the NPDES section of the statute.

The District holds NPDES permits for its discharges of storm water from its MS4s. Therefore, this case can and should be resolved under the provisions of the Clean Water Act governing storm water without resort to the law applicable to water transfers, including *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*").

ARGUMENT

The Clean Water Act is clear regarding storm water discharges from MS4s: they are subject to NPDES requirements. Equally clear is that storm water discharges from MS4s are not water transfers. This controversy can and should therefore be resolved pursuant to the provisions of the Act governing storm water. The Court need not, and should not, reach water transfers and its holding in *Miccosukee*.

I. THE CLEAN WATER ACT GENERALLY PROHIBITS THE DISCHARGE OF POLLUTANTS BY POINT SOURCES EXCEPT IN COMPLIANCE WITH NPDES REQUIREMENTS.

In 1972, Congress enacted amendments to the Federal Water Pollution Control Act, now popularly known as the "Clean Water Act" ("Act"). The Act outlaws "the discharge of any pollutant" subject to several exceptions, including where an NPDES permit is obtained. 33 U.S.C. §§ 1311, 1342(a)(1). "Discharge" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters," in turn, is defined as "the waters of the United States." 33 U.S.C. § 1362(7); *see also Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1223 (11th Cir. 2009). In short, the Act generally prohibits point sources from discharging pollutants to waters of the United States without an NPDES permit.

A. MS4 STORM WATER DISCHARGES ARE SPECIFICALLY SUBJECT TO NPDES REQUIREMENTS.

Storm water conveyances through MS4s are not water transfers. As defined by EPA:

> "*Municipal separate storm sewer* [MS4] means a *conveyance or system of conveyances* . . . designed or used for *collecting or conveying storm water*. . . ." 40 C.F.R. § 122.26(b)(8)(ii) (emphasis added).
>
> "*Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) (emphasis added).
>
> An MS4 "*does not include . . . conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.*" 40 C.F.R. § 122.26(b)(9) (emphasis added).
>
> "*Water transfer* means an *activity* that *conveys or connects waters of the United States* without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (emphasis added).

Two characteristics in particular distinguish MS4s and water transfers. First, an MS4 conveys "storm water," whereas a water transfer conveys "waters of the United States." Second, an MS4 consists of a *physical* "conveyance or system of conveyances." A water transfer, in contrast, is an "*activity* that conveys or connects." These distinguishing characteristics have

legal significance with regard to NPDES requirements. Most MS4s are explicitly subject to NPDES requirements under the Act, while water transfers are generally excluded from NPDES regulation.

Congress specifically subjected large MS4s to NPDES requirements. Subsection 402(p) of the Act explicitly states that the NPDES program applies to "[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 250,000 or more" and "[a] discharge from a municipal separate storm sewer system [MS4] serving a population of 100,000 or more but less than 250,000." 33 U.S.C. §§ 1342(p)(2)(C), -(D).

The history of storm water regulation under the Act underscores the applicability of the NPDES program to MS4s. EPA attempted to exempt separate storm sewers from NPDES requirements in 1973, shortly after Congress enacted the statute. *NRDC v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977). EPA's rationale for these exemptions was that it was necessary to exclude these smaller sources of pollutant discharges from the permit program in order to conserve the Agency's enforcement resources for more significant point sources of pollution. *Id.* at 1372-73. EPA, however, never asserted that MS4s were not subject to NPDES requirements, even when attempting to exempt them from obtaining an NPDES permit. *See, e.g.*, 38 Fed. Reg. 18,003 (July 5, 1973).

The courts rejected EPA's attempt to exempt separate storm sewers and held that Congress intended to

require NPDES permits for storm water discharges. *NRDC v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd*, *Costle*, 568 F.2d at 1383. "Following this decision, EPA issued proposed and final rules covering storm water dischargers in 1980, 1982, 1984, 1985 and 1988." *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). NRDC challenged many of these rules at the administrative level and in the courts. *NRDC v. EPA*, 966 F.2d 1292, 1296 (9th Cir. 1992). EPA accordingly made little headway in bringing storm water discharges into the NPDES program.

Recognizing both the environmental threat posed by storm water runoff and EPA's problems in implementing regulations, Congress passed the Water Quality Act of 1987 containing amendments to the CWA, portions of which set up a new scheme for NPDES regulation of storm water, including MS4s. Pub. L. No. 100-4, 101 Stat. 7, § 405 (1987) (codified at 33 U.S.C. § 1342(p)); *see also NRDC v. EPA*, 966 F.2d at 1296. The amendments set explicit and firm deadlines for NPDES regulation of storm water discharges, *American Mining Congress*, 965 F.2d at 763, including MS4s, 33 U.S.C. § 1342(p) (1987). Each of the 46 states with EPA-delegated authority to implement the Act applies NPDES requirements to MS4 storm water discharges. U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System (NPDES) State Program Status*, April 14, 2003, available at http://cfpub2.epa.gov/npdes/statestats.cfm.

In marked contrast to storm water – which has always been subject to NPDES requirements – water transfers never have been. In fact, water transfers are not mentioned in section 402 of the Act, which established the NPDES program. Moreover, "[a]s a matter of longstanding Agency practice, EPA has not issued NPDES permits for mere water transfers; nor has it ever stated in any general policy or general guidance that an NPDES permit is required for such transfers." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-80309 Civ., 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006), U.S. Mot. for Summ. J. and Mem. of Law in Supp., U.S. Ex. 1, Agency Interpretation on Application of Section 402 of the Clean Water Act to Water Transfers, 2005 WL 6165796, at *2 (Aug. 5, 2005). *See also Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 168 (D.C. Cir. 1982); *Miccosukee*, 541 U.S. 95 (2004), Br. for the United States as *Amicus Curiae* in Supp. of Pet'r, 2003 WL 22137034, at **28-29; *Friends of the Everglades v. EPA*, Appeal Nos. 08-13652, 08-13653, 08-13657, 08-14921 & 08-16283 (consolidated) (11th Cir., Dec. 2, 2010), Br. for Resp'ts [EPA], at 37-41; National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,703 (June 13, 2008).

EPA promulgated the Water Transfers Rule, 40 C.F.R. § 122.3(i) • excluding water transfers from NPDES requirements – in response to judicial decisions holding that water transfers were subject to NPDES requirements. 71 Fed. Reg. 32,887 (June 7, 2006). And the Eleventh Circuit Court of Appeals

has sustained EPA's Water Transfers Rule. *See Friends of the Everglades*, 570 F.3d at 1228 (upholding the Water Transfers Rule "until the EPA rescinds or Congress overrides the regulation."). Finally, neither EPA nor any of the 46 states with EPA-delegated authority to implement the NPDES program applies the NPDES requirements of section 402 of the Act to water transfers.[3]

B. THE DISTRICT HOLDS NPDES PERMITS FOR ITS MS4s.

The two LA Basin MS4s involved here carry urban runoff from Los Angeles and surrounding areas to inland rivers and eventually to the ocean. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2 (C.D. Cal. Mar. 2, 2010). The District operates the specific MS4s at issue. *NRDC v. County of Los Angeles*, 673 F.3d 880, 884 (9th Cir. 2011). The District's storm water discharges to two rivers are the heart of this appeal: the Los Angeles River, which has a watershed of 825 square miles, and the San Gabriel River, which has a watershed of 450 square miles. *NRDC*, 673 F.3d at 889.

The NPDES program applies to "[a] discharge from a municipal separate storm sewer system serving a population of 250,000 or more." 33 U.S.C. § 1342(p)(2)(C). The two LA Basin MS4s each serve a

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[3] Pennsylvania issues "NPDES" permits for some water transfers pursuant to state law.

population of 250,000 or more. Indeed, the District, Los Angeles County, and 84 municipalities have operated their MS4s since 1990 pursuant to NPDES permits. *NRDC v. County of Los Angeles*, 673 F.3d at 886.

The District has not disputed that its MS4s are subject to NPDES permitting, nor that the District's MS4s carry storm water. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2.

In short, this is a storm water issue involving the District's MS4. The Court can and should decide this case pursuant to the provisions of section 402 of the Act governing storm water discharges, associated EPA regulations, and the MS4 Permits.

II. *MICCOSUKEE* IS NOT APPLICABLE TO THE DISTRICT'S MS4.

The District asserts that it is merely transferring water within single bodies of water, i.e., the Los Angeles River and San Gabriel River. Pet. for Writ of Cert., at 42-43. Thus, the District argues, it is not liable for discharges of storm water passing through its man-made channels within the rivers where the mass emission monitoring stations required by its NPDES permit are located, citing this Court's holding in *Miccosukee*, *supra*.

The Court should not be misled by this mischaracterization of the District's MS4 storm water discharges. The issue in this case is whether the District is liable for violations of its MS4 permits

and/or the Clean Water Act, not whether the District's MS4s require permits.

Indeed, the District does not dispute that its MS4s are subject to NPDES permitting, or that its MS4s carry storm water. *NRDC v. County of Los Angeles*, 2010 WL 761287, at *2. The District also admits that "assessing compliance with the Permit . . . would be accomplished through various activities, including monitoring of "mass-emissions" at seven mass-emission monitoring stations." Pet. for Writ of Cert., at 9-10. Those stations are located in the man-made channels within the two rivers. *Id.*; *see also NRDC v. County of Los Angeles*, 673 F.3d at 900. And the District does not dispute that storm water passing through the stations causes exceedances of the water quality standards specified in its NPDES permit. *NRDC v. County of Los Angeles*, 2010 WL 761287, at **2-3.

These facts amply demonstrate that this is an MS4 storm water case that the Court should decide pursuant to the NPDES provisions of the Act applicable to MS4s. This Court need not, and should not, reach the issue of water transfers and its decision in *Miccosukee*.

CONCLUSION

For all the foregoing reasons, *Amici* respectfully urge the Court to decide this case pursuant to the provisions of section 402 of the Act governing storm water discharges, associated EPA regulations, and the District's MS4 Permit. The Court need not, and should not, reach the issue of water transfers and its decision in *Miccosukee* because this is simply a storm water case that does not involve water transfers.

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